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THE ICJ'S "UGANDA WALL": A BARRIER TO THE PRINCIPLE OF DISTINCTION AND AN ENTRY POINT FOR LAWFARE

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To determine the magnitude, causes, distribution, risk factors and cumulative burden of injury in a population experiencing armed conflict in northern Uganda since 1986...we took a multistage, stratified, random sampling from the Gulu district...1 of 3 districts in Northern Uganda affected by war since 1986... A similar rural district (Mukono) not affected by war was used for comparison...Of the study population, 14% were injured annually...Only 4.5% of the injured were combatants...The annual mortality of 7.8/1000 in Gulu district is 835% higher than that in Mukono district.[1]

The risk to civilians in armed conflict has steadily risen since World War II,[2] and the United Nations currently estimates that ninety percent of the casualties in modern armed conflict are women and children, presumably civilians.[3] This is particularly deplorable given that the 1949 Geneva Convention Relative to the

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1. Ronald R. Lett, Olive Chifefe Kobusingye, & Paul Ekwaru, *Burden of Injury During the Complex Political Emergency in Northern Uganda*, 49 CAN. J. OF SURGERY 51, 51 (2006).

2. *See, e.g.*, Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 75 (2005). *See also* Lett, et al., *supra* note 1, at 51 (stating, "The proportion of civilian war-related deaths has increased from 19% in World War I, 48% in World War II, to more than 80% in the 1990s. Civilians are used as shields to protect the military, abducted, enslaved, tortured, raped and executed.").

3. UNICEF, CHILDREN IN CONFLICT AND EMERGENCIES, http://www.unicef.org/protection/index_armedconflict.html; See also Lisa Avery, The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War, 51 LOY. L. REV. 103, 103 (2005) (stating, "During the last decade alone, two million children were killed, another six million were seriously injured or left permanently disabled, and twice that number of children were rendered homeless by the ravages of war.").

Protection of Civilian Persons in Time of War[4] (GCC) was written in response to the dramatic numbers of civilian casualties in World War II.[5] There are, undoubtedly, a number of reasons for this increase.[6] However, one of the most significant reasons for the rise in civilian deaths has been the mingling of combatants[7] with civilians on the battlefield.[8]

Nowhere has this been more obvious than in the recent conflict in Iraq. Not only have insurgents such as Abu Musab al-Zarqawi specifically targeted civilians,[9] but they have also refused to distinguish themselves from the civilian population.[10] Rather, they have chosen to blend in with the local populace,

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4. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287 [hereinafter Convention Relative to the Protection of Civilians].

5. *See, e.g.*, LTC Paul Kantwill & MAJ. Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons:" How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 725 (2005), *and* Reynolds, *supra* note 2, at 58; HISTORY LEARNING SITE, CIVILIAN CASUALTIES OF WORLD WAR II, http://www.historylearningsite.co.uk/civilian_casualties_of_world_war.htm (estimating civilian casualties to amount to more than half of the total casualties during WWII).

6. *See* Judith Graham & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1, 10-11 (2000) (arguing that the use of indiscriminate weapons such as landmines is a significant factor; *and* R George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 WAKE FOREST L. REV. 129, 131 (2003) (arguing that some weaker foes intentionally target civilians for the sake of military necessity or perceived necessity).

7. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Though there may be a few exceptions, persons on the battlefield can generally be divided into three categories: combatants, noncombatants, and civilians. Combatants are those members of the armed forces that meet the qualifications of Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War); Convention Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, § 1, ch. 1, art. 3, Oct. 18, 1907, 1907 U.S.T. LEXIS 29, 1 Bevans 631 (Noncombatants are also members of the armed forces under Article 3 of the Annex on Regulations Respecting the Laws and Customs of War on Land to the Hague Convention (IV) respecting the Laws and Customs of War on Land); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 (Noncombatants include combatants who meet the above definition who are *hors de combat* and other members of the armed forces such as chaplains and medical personnel. Civilians are not covered by the above definitions. However, in many cases, including works and articles cited herein, noncombatants is used more generally to include all who are not combatants).

8. Reynolds, *supra* note 2, at 75-77 (arguing that "concealment warfare," or the mixing of military personnel or targets with civilians, has been partially responsible for this increase).

9. John Ward Anderson & Jonathan Finer, *The Battle for Baghdad's Future; Three Years After Its Fall, Capital Is Pivotal to U.S. Success in Iraq, Officers Say*, WASH. POST, Apr. 9, 2006, at A17; Julian E. Barnes, *Sliding Toward an Uncivil War*, U.S. NEWS & WORLD REPORT, March 6, 2006, at 14-15; Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733 (2005).

10. *See CNN Live Event: Coalition News Briefing* (CNN television broadcast Apr. 11, 2004) (Transcript No. 041101CN.V54) (BG Kimmitt stating, "At 4:45, while moving from (UNINTELLIGIBLE) to clear an armed enemy—a coalition force was ambushed by enemy elements of unknown size. Reports indicate at least 20 rocket grenades were observed during the course of the

making it much more difficult for coalition and Iraqi military to distinguish between the insurgents and the innocent bystanders.[11] The obvious result of such tactics is to increase the danger to civilians. This creates a difficulty for those who are trying to comply with the law of war.

> When faced with such opponents, militaries intent on complying with the Law of War struggle between the requirements of distinction and their desire to protect non-combatants, and the practical reality of protecting their force from fighters... who act as combatants when engaging in combat but dissolve into the crowd of non-combatants when faced with opposing military forces.[12]

This intermixing of combatants with civilians while engaging in hostilities violates one of the most fundamental principles of the law of armed conflict: the principle of distinction. This bedrock principle of the law of war requires those involved in conflict to mark themselves so they can be distinguished from those who are not involved in combat. The most common method of compliance is for combatants to wear a uniform, but other methods of setting a combatant apart from a non-combatant are also authorized.[13] By requiring distinction, both combatants and civilians know who is involved in the combat and who is not. Thus, they can both make informed decisions of how to proceed in a combat environment.

The derogation from the principle of distinction is among the most serious issues facing the law of war today.[14] As combatants relax the requirement obliging them to mark themselves, erosion of this distinction will lead to greater intermixing of combatants with civilians. Increased civilian casualties will inevitably result because of the inability to discern who is "targetable" and who is not. Unfortunately, the current trend in the development of the law of war seriously undermines the principle of distinction by allowing, or even encouraging, would-be fighters to evade distinguishing themselves. Instead, these combatants seek the protections of civilians while not accepting the responsibilities of eschewing combatants' acts. This is a devastating trend that must be reversed or it will result in the destruction of the current law of war.

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engagement. Forty to 50 armed individuals were observed, some wearing black pajamas, uniforms, others wearing civilian clothes.").

11. *See CNN Live Sunday: U.S. Helicopter Shot Down in Iraq, Both Pilots Killed; 7 Chinese Citizens Taken Hostage in Iraq* (CNN television broadcast Apr. 11, 2004) (Transcript No. 041104CN.V36) (quoting a military spokesperson as saying:

> We are working at a disadvantage...The lack of uniforms, so that you can't define the enemy very well. And the intertwining of the enemy with combatants is very, very difficult. So you've got combatants and non-combatants mixed together intentionally...[I]f you think about just the way that, for instance, the Shi'ias could basically in this area right here, thousands of pilgrims on their way into this region right here, and the militia being able to just take off the black uniforms, and blend right in, into all those pilgrims).

12. Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L. L. 209, 211 (2005).

13. Major William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 106-09 (2003).

14. *See* George H. Aldrich, *The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT'L. L. 42, 42 (2000) (listing combatant status and protection of civilians as two of the top five areas of the law that need further development in the early 21st century).

This paper will briefly introduce the principle of distinction, reviewing its basis in customary international law and early conventional codifications. The Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (GPI) will then be analyzed and proffered as the beginning of the official derogation from the principle of distinction and the genesis of an increasing disregard of the requirement that combatants distinguish themselves from civilians. Two recent cases from the International Court of Justice (ICJ), the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[15] and the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda),[16] will then be discussed and criticized for promoting the same trend, giving official incentive for nations to use non-uniformed insurgents rather than official militaries who would be expected to comply with the law of armed conflict. The significant danger this poses to the law of war in the age of asymmetrical lawfare will then be illustrated. Finally, some recommendations will be made as to steps the international community can take to reinstate the principle of distinction and reinvigorate the protections afforded to civilians.

I. PRINCIPLE OF DISTINCTION

"At the very heart of the law of armed conflict is the effort to protect non-combatants by insisting on maintaining the distinction between them and combatants."[17] This principle "prohibits direct attacks on civilians or civilian objects"[18] and is codified in Article 48 of the GPI[19] which states, "In order to

15. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) [hereinafter Advisory Opinion No. 131].

16. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo *v.* Uganda) (Order of Dec. 19, 2005), *available at* http://www.icj-cij.org/docket/files/116/10455.pdf (last visited Oct. 10, 2007) [hereinafter Dem. Rep. Congo v. Uganda].

17. W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM .J. INT'L .L. 852, 856 (2006).

18. Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148 (1999).

19. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), *supra* note 7, at art. 48. (Concerning article 48, the Commentary to GPI states:

> The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, (3) which had stated that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." Admittedly this was concerned with preventing superfluous injury or unnecessary suffering to combatants by prohibiting the use of all explosive projectiles under 400 grammes in weight, and was not aimed at specifically protecting the civilian population. However, in this instrument the immunity of the population was confirmed indirectly);

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Commentary, part IV, § 1, ch. 1, art. 48, para.

ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[20] However, this principle only attained such general acceptance after a long history of slow evolution in the laws of armed conflict. This evolution began millennia ago and arose out of recognition that regulating conflict, even if only to a limited degree, would have benefits.[21]

Many ancient cultures had rules concerning the conduct of hostilities.[22] As these rules evolved through time and culture, their focus was to provide protections for those who were engaged in hostilities and were acceptable only if they provided some military advantage or fulfilled some military purpose.[23] For example, as early as the 5th century B.C., Sun Tzu wrote, "Treat the captives well, and care for them... Generally in war the best policy is to take a state intact; to ruin it is inferior to this."[24] Sun Tzu's apparent concern for captives and enemy property and persons was not born from a humanitarian desire to preserve his adversary but as part of the overall goal to conquer that enemy. Contrast Sun Tzu's tactics with that of the Roman armies during the 5th and 6th centuries. Although they had rules about military conduct in war, "Plunder was general; and no distinction was recognized between combatants and noncombatants"[25] because the military's need to plunder was too great. Similar approaches were taken by the Babylonians, Hittites, Persians, Greeks, and others.[26] Any protections granted to noncombatants and civilians grew generally out of a utilitarian view of warfare and not from an ideological desire to preserve them from the horrors of war.[27]

During the age of chivalry, the customs and usages of war continued to take a utilitarian view and developed rather intricate rules for plunder[28] and siege.[29]

1863, *available at* http://www.icrc.org/ihl.nsf/COM/470-750061?OpenDocument [hereinafter GPI Commentary].); *see also* Ferrell, III, *supra* note 13 (offering an excellent discussion on the practical application of the principle of distinction, and particularly the provisions of GPI, to special operations forces).

20. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), *supra* note 7, at art. 48.

21. *Id.* at Preamble.

22. *See, e.g.*, William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, note 12 (2004).

23. *Id.* at 697-710 (presenting an excellent overview of this concept).

24. SUN TZU, THE ART OF WAR 76 (Samuel Griffith trans., Oxford Univ. 1963).

25. Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. Tol. L. Rev. 111, 114 (2001) (giving an excellent overview of the laws of war during the Age of Chivalry).

26. Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL. L. REV. 176, 182-85 (2000).

27. *See, e.g.*, David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, THE NAT'L INTEREST, Fall 2003, at 6 (stating, "The reasoning behind the practical nature of both customary law and the Geneva Conventions was obvious: a humanitarian 'law' that impeded the ability of states to defend their vital interests would, in practice, amount to nothing but a series of pious aspirations.").

28. *See* Wingfield, *supra* note 25 at 115-16 (stating:

> To preserve discipline and guarantee a fair distribution, the booty was usually gathered centrally and then distributed after the battle to each soldier in accordance with his rank and merit. The precise

They contained a number of very important rules for relations between fighters, such as ransom[30] and parole,[31] as well as combat rules, such as the distinction between ruses and perfidy.[32] As the feudal system gave way to the rise of the nation state, and its dominance as the major player in international relations,[33] knights also gave way to the use of professional armies. While civilians had been incidental to the conflicts up to this point, this transition broadened the scope of who participated in hostilities. As Nathan Canestaro writes:

> The erosion of the line between civilians and the professional military began with the fundamental changes in warfare seen in the Napoleonic era. The expanding scale of warfare, the advent of popular revolutions in some European countries, especially France, and repeated clashes between professional soldiers and armed peasantry during the Napoleonic wars, brought commoners into warfare in significant numbers for the first time.[34]

With this increase in the scope of hostilities, the battlefield was prepared for a renewed focus on the laws governing war, including the consideration of noncombatants and civilians.

By the middle of the 19th century, nations began to codify the rules that had developed up to that point.[35] Examples of this include the 1863 Lieber Code,[36] the

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customs governing the division of spoil varied from country to country, but everywhere this distribution created a legally recognized, heritable, and assignable right of property in the captured objects. Military historians have long admired the close coordination between English naval forces patrolling along the coast of northern France and the English land armies pillaging the interior of the country. The admiration is not misplaced; but it is worth remarking that this fleet not only provided food and supplies to the army. It also acted as a kind of floating safe-deposit box for the troops, who could be sure that their loot would get back to their families in England even if they did not survive the campaign).

29. *Id.* at 117-19 (stating:

> A siege began when a herald went forward to demand that a town or castle admit the besieging lord. If the town agreed, this constituted surrender, and the lives and property of the townspeople would be protected. If the town refused to surrender, however, this was regarded by the besieging lord as treason, and from the moment the besieger's guns were fired, the lives and property of all the town's inhabitants were therefore forfeit . . . . Strictly speaking, the resulting siege was not an act of war but the enforcement of a judicial sentence against the traitors who had disobeyed their prince's lawful command).

30. *Id.* at 116-17; Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY LAW. 4, 4 (1997) (noting, "The practice of not killing one's captives, however, was rooted in fiscal reasons, not humanitarian reasons.").

31. *See* Maj. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 201-08 (June, 1998).

32. *Wingfield, supra* note 25, at 131.

33. *See* Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT'L L. 73, 83 (2004) (noting, "The principle that the right to wage war is limited to sovereign authority was asserted by the prominent Sixteenth Century legal scholar and father of international law, Hugo Grotius . . . .").

34. *Id.* at 84.

35. *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 706 (2004) (arguing that the codification of the modern law of armed conflict is a generally western notion).

36. DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF

1868 Declaration of St. Petersburg,[37] the unratified Brussels Conference of 1874,[38] the Hague Conventions of 1899 and 1907,[39] and the 1909 Naval Conference of London.[40] These conventions came to be known as the "Hague tradition."[41]

The Hague tradition, typified by the 1907 Hague Regulations, became the foundation upon which all modern laws of armed conflict are built,[42] and they embody concepts still valid today.[43] This Hague tradition focused on the

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CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3 (3rd ed. 1988) (An analysis of the provisions of the Lieber Code show that it "acknowledge[s] the supremacy of the warrior's utilitarian requirements even though explicitly referring to the need to balance military necessity with humanitarian concerns."); Eric Krauss & Michael Lacey, *Utilitarian vs. Humanitarian: The Battle Over the Law of War,* PARAMETERS, Summer 2002, at 76, *available at* http://www.carlisle.army.mil/USAWC/Parameters/02summer/lacey.htm; Reynolds, *supra* note 2, at 7-8 (writing:

> The Lieber Code specifically prohibited the targeting of civilians and civilian objects. It also recognized that collateral damage should be avoided, but was acceptable if it was the result of an attack on a legitimate military objective. The Lieber Code articulates basic principles of the law of war, including the principle of military necessity in Articles 14 and 15. "Military necessity [consists of] . . . those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." Further, "Military necessity admits of all direction of destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable . . . ." Lieber defined the principle of distinction when he stated, "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit").

37. SCHINDLER & TOMAN, *supra* note 36, at 101, *available at* http://www.icrc.org/IHL.nsf/FULL/130?OpenDocument (stating in the preamble, "The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.").

38. *Id.* at 25, *available at* http://www.icrc.org/IHL.nsf/FULL/135?OpenDocument (though civilians are not defined, Article 9 deals with combatants and states:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. That they be commanded by a person responsible for his subordinates;
> 2. That they have a fixed distinctive emblem recognizable at a distance;
> 3. That they carry arms openly; and
> 4. That they conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia constitute the army, or form part of it, they are included under the denomination 'army').

39. *Id.* at 63-103.

40. *Id.* at 843.

41. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?* 90 CORNELL L. REV. 97, 108-09 (2004) (stating:

> The jus in bello is further subdivided into Geneva law and Hague law. Comprised principally of the four 1949 Geneva Conventions and the two 1977 Additional Protocols, Geneva law is a detailed body of rules concerning the treatment of victims of armed conflict. Embodied principally in the 1899 and 1907 Hague Conventions, Hague law prescribes the acceptable means and methods of warfare, particularly with regard to tactics and general conduct of hostilities. Though Geneva law and Hague law overlap, the terminology distinguishes two distinct regimes: one governing the treatment of persons subject to the enemy's authority (Geneva law), and the other governing the treatment of persons subject to the enemy's lethality (Hague law). International humanitarian law embraces the whole jus in bello, in both its Geneva and Hague dimensions).

42. Christopher L. Blakesly, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1064-65 (2003).

43. Int'l. & Operational Law Dep't, The Judge Advocate General's Legal Center and School, U.S.

combatants and was based on a utilitarian view of warfare not only to provide limited protections for fighters while in battle but also to maintain the warrior ethos of chivalry.[44] Commenting on the utilitarian nature of the Hague tradition, George Aldrich wrote, "The 1907 Hague Regulations contain very few provisions designed to protect civilians from the effects of hostilities. Aside from the prohibition on the employment of poison or poisoned weapons, which was primarily intended to protect combatants, the only such rules are Articles 25-28."[45]

This era of codification, steeped in the notion of the law of war being a tool for combatants rather than an external limitation, is typified by the statement traditionally attributed to the German Chancellor, Otto von Bismarck: "What leader would allow his country to be destroyed because of international law?"[46] International law was formed from the combatant's point of view, not the noncombatant.

Concurrent with the codification of the utilitarian law of war in the middle of the 19th century, others began exercising an increasingly prominent voice relating to the laws of armed conflict.[47] These voices expressed concern for the victims of armed conflict, which were initially combatants, but later included noncombatants and civilians. The founding of the International Committee of the Red Cross (ICRC) after Henri Dunant's experience at the 1859 Battle of Solferino[48] and the subsequent 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field[49] with its accompanying Additional Articles of 1868[50] are examples of the developing movement. This was followed by

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ARMY, JA 422, OPERATIONAL LAW HANDBOOK, 12-15 (Derek I. Grimes ed., 2006).

44. *See Wingfield*, *supra* note 25, at 135-36.

45. *See* Aldrich, *supra* note 14, at 50 (continuing:

> Article 25 forbids the bombardment 'of towns, villages, dwellings, or buildings which are undefended.' By undefended, it was clear that the article meant that there were no defending armed forces in the town or other area in question or between it and the attacking force and consequently that it was open for capture by the attacker. It clearly did not apply to towns, villages, and so forth, that were in the hinterland and consequently were not open to immediate capture – or, in 1907, even to bombardment. Essentially, the article was a commonsense prohibition against bombarding something that could be taken without cost to the attacker. Articles 26 and 27 were precautionary measures, and neither suggests that its primary object was to minimize civilian casualties, although they might have provided some beneficial incidental effects for civilians in places under siege or bombardment. Article 28, which prohibits pillage, protects civilians only after the fall of the town or place and was necessary to make clear that the ancient custom permitting pillage of places that had resisted sieges was no longer acceptable).

46. *See* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 63-64 (1994).

47. *See* LOUISE DOSWALD-BECK, *Implementation of International Humanitarian Law in Future Wars, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 42 (Naval War College International Law Studies, vol. 71) (Michael N. Schmitt & Leslie C. Green eds., 1998) (arguing the advance in weapons technology also drove states to try and enact laws to limit warfare).

48. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, *From the Battle of Solferino to the Eve of the First World War*, at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNVP (providing a concise history of Dunant, including the Battle of Solferino).

49. SCHINDLER & TOMAN, *supra* note 36, at 279.

50. *Id.* at 285.

continuing codifications such as the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[51]

These humanitarian efforts focused on greater protections for combatants and became known as the "Geneva tradition"[52] because the ICRC was headquartered in Geneva, Switzerland, and many of the early conferences were held there. These innovations were welcomed by the combatants and are still accepted as imbedded in the practical realities of warfare.[53]

WWII exhibited an exponential rise in wartime costs to civilians, both in terms of lives lost and in property damage.[54] Increasingly lethal technology and weapons led to increasing effects on civilians.[55] "At the end of the nineteenth century, the overwhelming percentage of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority of persons killed or injured in most international armed conflicts have been civilian non-combatants."[56] This disturbing direction of warfare heightened the concern for the victims of warfare, particularly after the devastation of WWII.

In the years immediately following the war, a shifting of focus continued to add protections for combatants and noncombatants but also began to intertwine them with protections for civilians.[57] Codification of this shift began with the four 1949 Geneva Conventions.[58] While the first three Geneva Conventions[59] built upon preexisting established principles that survived WWII and were aimed at treatment of members of the armed forces, the Convention (IV) relative to the Protection of Civilian Persons in Time of War[60] extended certain protections to civilians based on their status as non-participants in the conflict.[61] All four conventions were advances in humanitarian law and proscribed many of the horrors of WWII in order to prevent them from occurring again. In fact, the fourth convention required military commanders to modify operations based solely on their potential effects on the civilians on the battlefield.

Underlying all four conventions was the idea that all persons on the battlefield could be divided into three distinct groups (combatants, noncombatants or

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51. *Id.* at 301.

52. *See Wingfield*, *supra* note 25, at 134-35.

53. DOSWALD-BECK, *supra* note 47, at 41.

54. Compare the estimated number of deaths in WWII (http://www.valourandhorror.com/DB/BACK/Casualties.htm) with those in WWI (http://www.vw.cc.va.us/vwhansd/HIS122/WWIcasualties.html).

55. Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 326 (1951).

56. Aldrich, *supra* note 14, at 48.

57. *See* Rivkin & Casey, *supra* note 27, at 60-61.

58. Bradford, *supra* note 22, at 765-70.

59. SCHINDLER & TOMAN, *supra* note 36, at 305-425.

60. *Id.* at 427-85.

61. Krauss & Lacey, *supra* note 36, at 77 (noting, "[p]revious conventions had forced the utilitarians to deal with issues such as the treatment of the sick and wounded and prisoners of war . . . [t]he Civilian Convention for the first time placed affirmative obligations . . to address the food, shelter, and health-care needs of civilians").

civilians), and that it is unlawful to target those who were not combatants.[62] Although no definition was provided for persons who were not combatants, all who wanted the protections and privileges of prisoners of war were obliged to strictly comply with Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).[63] This includes a requirement for all to distinguish themselves from the local populace who were not engaging in combatant activities.

In the two decades that followed the 1949 Geneva Conventions, the global political climate developed into a bi-polar world, with the United States and its North Atlantic Treaty Organization members directly opposing the Soviet Union and its supporting Warsaw Pact members. The most significant aspect of this bi-polar world was the lack of armed conflict between the major powers.[64] While many conflicts erupted across the globe, they were characterized by struggles for self-determination or other small-scale wars where nations acted as surrogates for the superpowers.[65] These wars were not characterized by the massing of large, uniformed, state-sponsored armies, but rather by small groups of often unorganized and un-uniformed freedom fighters.[66]

During one such war, the Vietnam War, numerous allegations arose that many of the provisions of the Geneva Conventions were disregarded,[67] including fighters not distinguishing themselves in the conduct of battle. In response to these violations and in an attempt to update the 1949 Geneva Conventions,[68] the ICRC led the world[69] in adopting the 1977 Protocols to the Geneva Conventions.[70]

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62. Maj. Charlotte M. Liegl-Paul, *Civilian Prisoners of War: A Proposed Citizen Code of Conduct*, 182 MIL. L. REV. 106, 113 (2004); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8), *available at* http://www.icj-cij.org/docket/files/95/7495.pdf [hereinafter Legality of the Threat Opinion] (holding, "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following . . . States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets").

63. SCHINDLER & TOMAN, *supra* note 36, at 355-425.

64. *See* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 462-65 (2003).

65. *See* Thomas M. Franck, *The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 61 (2001).

66. *Id.* at 60-61.

67. Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, n.130 (1999) (referencing the alleged American violations of the law of war); Jeffrey F. Addicott & William A. Hudson, *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 174-75 (1993) (referencing the alleged North Vietnamese violations of the law of war); *Cf.* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 43 (1995) (stating that law of war violations were not prosecuted during this time period because of the superpower deadlock between the United States and the Soviet Union).

68. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 679 (1994); Aldrich, *supra* note 14, at 45 ("In the years since the Geneva Conventions were concluded in 1949, the world has clearly changed greatly. A majority of the present states did not exist as states in 1949, and many of them gained their independence only after armed struggles against colonial powers.").

69. Lee A. Casey & David B. Rivkin, Jr., *Double-Red-Crossed*, THE NAT'L INT. 63, 67 (2005);

These Protocols, and particularly the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (GPI), accomplished the complete amalgamation of the Hague and Geneva traditions, breaking through that invisible barrier that had seemed to divide the two regulatory streams,[71] but at the expense of the "historic rule" of distinction.[72]

II. GPI AND THE EROSION OF THE PRINCIPLE OF DISTINCTION

One hundred and sixty-seven states are parties to GPI,[73] with an additional five countries that have signed but not yet ratified the text,[74] including the U.S.[75] Article 1 of GPI states the coverage of the Protocol:

> Art 1. General principles and scope of application....
>
> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[76]

The reference to Common Article 2 of the 1949 Geneva Conventions is important in that it limits the application both to whom and when it applies.[77] Common Article 2 states:

> Art 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 46 (1984).

70. SCHINDLER & TOMAN, *supra* note 36, at 551-629.

71. Legality of the Threat Opinion, *supra* note 62, at 256 ("These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.").

72. Reisman, *supra* note 17, at 856-57.

73. International Humanitarian Law –Treaties and Documents, available at http://www.icrc.org/ihl.nsf/CONVPRES?OpenView.

74. *Id.*

75. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (As a signatory, but not party, to the GPI, the U.S. has the obligation to not "defeat the object and purpose" of its provisions).

76. SCHINDLER & TOMAN, *supra* note 36, at 558

77. Murphy, *supra* note 69, at 49.

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a Party to the present Convention, the Powers who are Parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[78]

By their text, the application of the Conventions is limited to High Contracting Parties and to the three specific fact patterns: 1) declared war, 2) any other armed conflict even if the state of war is not recognized, and 3) partial or total occupation. The limit of the scope of the application to "High Contracting Parties" has been overcome by the acceptance of all four Geneva Conventions as customary international law, binding on all nations whether or not they are signatories.[79] However, the three specific fact patterns have not been expanded by any such generally accepted declaration. Therefore, that portion of the scope of common Article 2 is the substance that is directly incorporated into Article 1, paragraph 3, of GPI, limiting its scope and application.

Paragraph 4 of GPI, however, appears to expand the reach of the Protocol despite the language of paragraph 3.[80] In stating that "[t]he situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," the article establishes a potential overlap between the two paragraphs and the simultaneously promulgated Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (GPII).[81]

GPII's scope and application is stated in Article 1:

> Art 1. Material field of application
>
> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such

78. SCHINDLER & TOMAN, *supra* note 36, at 361-62.

79. *See* Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 50 (1999).

80. Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 598 (1983); Murphy, *supra* note 69, at 49-50.

81. SCHINDLER & TOMAN, *supra* note 36, at 558.

> control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
>
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[82]

If the apparent division between the two Protocols is intended to be international versus non-international armed conflicts as the titles suggest, the scope of GPII was seriously eroded at inception by the expansion of GPI to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," conflicts that are the prototype for non-international, or internal, armed conflicts.[83] Further, similar to GPI, the statement that GPII "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application" seems to be clear until the succeeding reference to Article 1 of GPI.

The United States strongly objects to this expansion of the coverage of the law of armed conflict and provides that as one of the reasons it refuses to ratify GPI.[84] In his Letter of Transmittal to the Senate, President Ronald Reagan stated:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology.[85]

This is important to the present discussion because it was this expansion coupled with the desire to cover fighters engaged in "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" that has led to

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82. *Id.* at 621.

83. *Id.* at 558. *But see* GPI Commentary, *supra* note 19, at para. 86-87, 90 (arguing that Common Article 2 initially contemplated inclusion of such conflicts, wars of liberation are really of an international character, and that wars of national liberation should be covered by the laws of armed conflict because of their characteristics, such as the intensity of the conflict).

84. *See* Remarks of Judge Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 463-71 (1987); Michael Lacey, *Passage of Amended Protocol II*, 2000 ARMY LAW. 7, n.3 (2000).

85. Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 AM. J. INT'L. L. 910, 911 (1987).

GPI's derogation from the principle of distinction.[86] By including those types of conflicts, which were traditionally not covered by the laws of combatant status, they included many fighters who traditionally do not comply with the requirements of combatant status.

Against the backdrop of expanded coverage, the Protocol then redefines the requirements for combatant status. After discussing a state's armed force in Article 43, GPI Article 44 provides:

> Article 44—Combatants and prisoners of war
>
> 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
>
> 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
>
> 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).
>
> 4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the

86. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol on the Protection of Victims of International Armed Conflict].

> case where such a person is tried and punished for any offences he has committed.
>
> 5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
>
> 6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
>
> 7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
>
> 8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.[87]

Article 44 was one of the most controversial provisions of the drafting convention,[88] and rightly so. It represents a significant change to the law of war. By reducing the requirement to participate in hostilities as a combatant to merely requiring an attacker to carry his arms openly,[89] the Protocol strikes a blow to the rule that has become the bedrock principle of civilian protection. As Professor Michael Reisman writes, "Article 44 constitutes a considerable relaxation, for at least one side to a conflict, of the historic requirement, as well as of the sanction that functioned as an enforcement mechanism. This change was not accomplished inadvertently."[90]

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87. *Id.* at art. 44.

88. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 para. 1684 (J. Pictet et al. eds., 1987), *available at* http://www.icrc.org/ihl.nsf/COM/470-750004?OpenDocument [hereinafter Pictet, COMMENTARY].

89. *See* Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Article 4 of the GPW sets out the requirements for irregular forces to be given combatant status and prisoner of war privileges); Sofaer, *supra* note 84 at 466-67 (asserting that the provisions of article 44 undermine the protection for civilians and provide support for terrorist activities); John C. Yoo & James C. Ho, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists*, 44 VA. J. INT'L L. 207, 225-28 (2003) (discussing article 44 and arguing that it dilutes the protections to civilians by encouraging unlawful combatants such as terrorists to engage in hostilities without complying with the traditional requirements of article 4 of the GPW); *But see* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. LAW 721, 741-43 (2001) (arguing that the protections for civilians is still the main focus of the Protocol despite the expansion of the term combatant).

90. Reisman, *supra* note 17, at 858.

The target of this relaxation was "guerilla warfare," a "modern battlefield... phenomenon" which can not be ignored.[91] Pictet states in his commentary:

> Guerrilla fighters will not simply disappear by putting them outside the law applicable in armed conflict, on the basis that they are incapable of complying with the traditional rules of such law. Neither would this encourage them to at least comply with those rules which they are in a position to comply with, as this would not benefit them in any way.[92]

This argument makes a mockery of paragraph 3's recounting of the basis for the principle of distinction: "the protection of the civilian population from the effects of hostilities."[93] While it may widen the scope of those who are classified as combatants, it fatally blurs the distinction between combatants and civilians.

Specifically, by allowing battlefield fighters to attack without wearing a uniform or other distinguishing element, GPI has completely undermined the reciprocal underpinnings of the principle.

> The venerable requirement imposed on combatants that, to be lawful, they must wear uniforms and bear arms openly is an indispensable and easily implemented and policed means for protecting noncombatants. Without these distinctive insignia, belligerents cannot distinguish adversaries from civilians, with predictable results.[94]

The predictable results include increased civilian casualties, as has been so clearly illustrated by recent events in Iraq.[95] In a conflict where soldiers are incapable of discerning between civilians and illegal fighters, "They must decide either not to shoot those who appear to be noncombatants and risk being killed, or attempt to distinguish between combatants and noncombatants, and in doing so, knowingly accept the risk of killing noncombatants for self-preservation."[96]

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91. Pictet, COMMENTARY, *supra* note 88, para. 1684.

92. *Id. But see* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 19–20 (2004) (arguing that the delegates to the 1949 Geneva Conventions did not want to grant combatant protections to groups fighting against their own government).

93. Protocol on the Protection of Victims of International Armed Conflict, at art. 44, para. 3.

94. Michael Reisman, Holding the Center of the Law of Armed Conflict, 100 AM. J. INT'L. L. 852, 856 (2006); See also Derek Jinks, The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Protective Parity and the Laws of War, 79 NOTRE DAME L. REV. 1493, 1497 (2004) (stating:

> the protection of noncombatants from attack is predicated on a clear distinction between combatants and noncombatants. If attacking forces cannot distinguish between enemy soldiers and civilians, this type of rule cannot work well....It is the goal of protecting innocent civilians that requires a sharp line between combatants and noncombatants).

95. Glenn Kutler, *Iraq Coalition Casualty Count*, iCasualties.org, http://icasualties.org/oif/IraqiDeaths.aspx (last visited July 28, 2007) (where claims of civilian deaths in Iraq are tracked and estimated. These large numbers of civilian deaths is attributable at least in part, if not in large part, to the intermixing of unlawful combatants with civilians); *CNN Live Event*, *supra* note 10; *CNN Live Sunday*, *supra* note 11.

96. Jensen, *supra* note 12, at 224; Mark D. Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?* 9/1/04 MIL. REV 17, at 23 ("Absent this ability

President Reagan recognized this and stated in his Letter of Transmittal to GPI that it:

> would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form.[97]

Not content to stop at paragraph 3 with its dangerously relaxed provisions for combatant status, the Protocol explicitly confirms the disadvantage to uniformed militaries in paragraph 7 by requiring them to continue to fight in the traditional methods despite being faced with foes who do not.[98] It does not take much military savvy as an insurgent leader to figure out how to take advantage of a legal system where only one side is required to mark themselves as combatants and the other side has the opportunity to hide amongst those it is illegal for the uniformed armies to kill.

Thanks at least in part to the natural results of Protocol I's derogation from the combatant status requirements, Gabriel Swiney states, "[T]he Principle of Distinction is violated across the world, often openly so, and that problem is getting worse. Something must be done."[99] Something has been done. Two recent cases have been taken to the International Court of Justice (ICJ) giving this international adjudicative body a chance to reestablish the sanctity of the principle of distinction and halt or even reverse the path of erosion begun by GPI. Unfortunately, the ICJ did the exact opposite and turned a perverse authorization to conduct military operations from amongst the noncombatant population into an illicit incentive to do so.

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to distinguish between lawful and unlawful combatants, an enemy might well be left with one of two targeting choices: do not engage any civilians, even though some are engaging its forces, or engage every enemy civilian on the battlefield. The latter choice will likely prevail."); Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 335 (1951) (arguing this as a reason why the existence of a *levee en masse* will likely force the invader to treat all civilians as hostile).

97. Ronald Reagan, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 AM. J. INT'L. L. 910, 911 (1987); Pictet, COMMENTARY, *supra* note 88, para. 1679 (Coming close to admitting the danger to civilians of this situation in the Commentary where he writes that "distinction between combatants and non-combatants may be more difficult as a result, but not to the point of becoming impossible.").

98. *See* Ferrell, *supra* note 13, at 105 (writing:

> [T]he [law of war] places a duty on parties to a conflict to distinguish combatants from civilians. This is a reciprocal duty, requiring all parties to distinguish among enemy combatants and civilians when conducting military operations and to ensure a party's own armed forces are distinguishable from enemy combatants and civilians.

99. Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733 (2005) (arguing then for replacing the principle of distinction with the Principle of Culpability which is based on each individual's actions rather than his status as a noncombatant.).

III. THE ICJ INCENTIVIZES THE USE OF FORCES THAT DO NOT DISTINGUISH THEMSELVES

The ICJ was established at the San Francisco Conference of 1945[100] to be the "principal judicial organ" of the United Nations.[101] Its jurisdiction is non-compulsory[102] but limited to state parties[103] except for specific exceptions such as a request for an advisory opinion from the General Assembly.[104] It was just such a request from the General Assembly that precipitated the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, known as the Wall Advisory Opinion.[105]

A. The Wall Advisory Opinion

In the Wall Advisory Opinion, the General Assembly asked the Court to provide an advisory opinion on the issue of:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[106]

The question resulted from the construction of a large wall,[107] or fence as the Israeli Supreme Court called it,[108] that meandered through the occupied territory of the West Bank.[109] The ICJ determined that the wall was illegal for a number of reasons,[110] with one of its major objections being that the path of construction

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100. Int'l Court of Justice, *The Court,* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm (for a short history of the ICJ).

101. *See* U.N. Charter, art. 92.

102. *See* STATUTE OF THE INT'L COURT OF JUSTICE, art. 36, 3 Bevans 1179; 59 Stat. 1031, T.S. No. 993.

103. *See id.* at art. 34.

104. *Id.* at arts. 65-68; U.N. Charter, art. 96

105. *See* Advisory Opinion No. 131, *supra* note 15.

106. *Id.* at para. 66.

107. This is the term used by the ICJ. *See* Karin Calvo-Goller, *Jurisdiction and Justiciability: More Than a Huge Imbalance: The ICJ's Advisory Opinion on the Legal Consequences of the Construction of the Barrier*, 38 ISR. L. REV. 165, 168-89 (2005) (arguing that the use of the term Wall illustrates the ICJ's purposeful misconstruing of the case); Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT'L L.J. 569, 571 (2005) (arguing that the Courts use of "this particular loaded term . . . would most likely cause people - even if unfamiliar with the issue - to feel a sense of aversion and antipathy towards a structure of this kind because of the immediate negative connotations of the expression.").

108. H.C.J. 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 1 (Barak, C.J.) (The Israeli Supreme Court used the term "fence"); *Cf.* Joshua Kleinfeld, *The Legal Status of the Barrier Between Israel and the Occupied Territory: For International Law, Against the International Court* (on file with author) (discussing the prejudging nature of the title given to the construction).

109. *See* Kleinfeld, *supra* note 108 (The facts concerning the actual location of the wall at various periods is a matter of dispute).

110. *Id.* (analyzing the ICJ decision with some dissatisfaction for various reasons) ; *See also,*

appeared to be an attempt to illegally take Palestinian lands or at least prejudge any future negotiations on where the permanent boundary should be.[111]

In response to allegations of illegality, Israel argued that the fence was a self-defense measure under Article 51 of the UN Charter,[112] which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[113]

The Israeli permanent representative to the UN General Assembly, Ambassador Dan Gillerman, stated prior to the ICJ case:

> [A] security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter. International law and Security Council resolutions, including resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.[114]

It was Israel's contention that the fence was legal as a measure of self-defense and that it represented a humane and proportionate response to the terror attacks. The ICJ disagreed.

In response to Israel's Article 51 claim, the Court said:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a

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Alberto De Puy, *Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories*, 13 TUL. J. INT'L & COMP. L. 275 (2005); Karin Calvo-Goller, *Jurisdiction and Justiciability: More Than a Huge Imbalance: The ICJ's Advisory Opinion on the Legal Consequences of the Construction of the Barrier*, 38 ISR. L. REV. 165 (2005); Rebecca Kahan, *Building a Protective Wall Around Terrorist—How the International Court of Justice's Ruling in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L.J. 827 (2005); Sean D. Murphy, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Territories: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L. L. 62 (2005); Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT'L L.J. 569 (2005).

111. Advisory Opinion No. 131, *supra* note 15, at para. 121. *See also* U.N. GA Press Release GA/10179, *General Assembly, in Resumed Emergency Session, Demands Israel Stop Construction of Wall, Calls on Both Parties to Fulfill Road Map Obligations* (Oct. 21, 2003); De Puy, *supra* note 110, at 297-99.

112. *Id.* at para. 116, 138.

113. U.N. Charter art. 51.

114. Sean D. Murphy, *AGORA: ICJ Advisory opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?*, 99 AM. J. INT'L L. 62, 62 (2003) (quoting U.N. GAOR, Emergency Special Sess., 21st mtg. at 6, U.N. Doc. A/ES-10/PV.21 (Oct. 20, 2003)).

> foreign State.
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368(2001) and 1373(2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
>
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.[115]

The fact that Israel has been subject to serious terror attacks is not in dispute. However, the Court declined to recognize those attacks as justification for Israel's actions.[116] Rather, the Court held that the right to respond in self-defense only arises when state action is involved. This restrictive reading of self-defense has been met with significant disagreement,[117] including among several of the Court's own Judges.[118]

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115. Advisory Opinion No. 131, supra note 15, at para. 139.

116. *See* Murphy, *supra* note 114, at 71-75.;

117. Murphy, *supra* note 114, at 62-63 (providing a detailed analysis of why the court erred in its analysis of article 51 by limiting armed attacks to states and stating eloquently:

> The position taken by the Court with respect to the *jus ad bellum* is startling in its brevity and, upon analysis, unsatisfactory. At best, the position represents imprecise drafting, and thus calls into question whether the advisory opinion process necessarily helps the Court "to develop its jurisprudence and to contribute to the progress of international law." At worst, the position conflicts with the language of the UN Charter, its *travaux preparatoires*, the practice of states and international organizations, and common sense. In addition to the lack of analytical reasoning, the Court's unwillingness to pursue an inquiry into the facts underlying Israel's legal position highlights a disquieting aspect of the Court's institutional capabilities: an apparent inability to grapple with complex fact patterns associated with armed conflict. Overall, the Court's style in addressing the *jus ad bellum* reflects an *ipse dixit* approach to judicial reasoning; the Court apparently expects others to accept an important interpretation of the law and facts simply because the Court says it is so).

118. *See* Advisory Opinion No. 131, supra note 15, at para. 33 (separate opinion of Judge Higgins) (Writing:

> I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (Merits, Judgment, I.C.J. Reports 1986*, p. 14). It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251));

Advisory Opinion No. 131, supra note 15, at para. 6 (separate opinion of Judge Burgenthal) (writing "the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State."); Advisory Opinion No. 131, supra note 15, at para.

After analyzing the Court's decision in the Wall Advisory Opinion, Professor Sean Murphy concludes:

> [T]he upshot of the Court's present jurisprudence appears to be that under the UN Charter, (1) a state may provide weapons, logistical support, and safe haven to a terrorist group; (2) that group may then inflict violence of any level of gravity on another state, even with weapons of mass destruction; (3) the second state has no right to respond in self-defense against the first state because the first state's provision of such assistance is not an "armed attack" within the meaning of Article 51; and (4) the second state has no right to respond in self-defense against the terrorist group because its conduct cannot be imputed to the first state, absent a showing that the first state "sent" the terrorist group on its mission. Such a legal construct, if intended, seems unlikely to endure.[119]

Professor Murphy's sobering assessment of the impact of the Court's decision is even more worrisome when its consequences to the principle of distinction are considered.

Imbedded in the Court's exposition of the right of self-defense is a crucial point concerning the principle of distinction and its continuing derogation. As mentioned above, the principle of distinction is designed to separate combatants from non-combatants in an effort to preserve the noncombatant population by disqualifying them as targets. In exchange for this willingness to be marked as a target (and meet the other qualifications of combatant status), combatants receive many benefits.[120] The greatest of these benefits is combatant immunity, which grants immunity for warlike acts, as long as fighters comply with the laws of war. Ideally, these incentives would be sufficient to entice those who want to engage in battlefield activities to legitimize themselves by meeting the requirements of GPW Article 4, including distinguishing themselves from the noncombatant populace. This can be done, in part, by becoming a member of a state's armed forces with its requirements of distinction, or otherwise clearly distinguishing oneself as part of an organized fighting group. Of course, the drawback to this commitment to distinction is that a fighter can no longer blend into the civilian noncombatant population and attack with some level of anonymity.

Even if the incentives were insufficient to entice individuals, the reciprocal benefits that would accrue to states from having all fighters clearly distinguished and subsequently eligible for combatant privileges should convince states to comply with the requirements of marking their forces. The argument is that as nations fight in compliance with the laws of war, honoring the principle of distinction not only benefits its uniformed armed forces by clearly identifying the

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35 (separate opinion of Judge Kooijmans) (While not agreeing that Israel could invoke article 51 based on the fact that the terrorist activities come from within Israel, writes that Security Council Resolutions 1368 and 1373 provide a basis for Israel's argument).

119. Murphy, *supra* note 114, at 66.

120. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 7 (discussing the methods and means of warfare and the treatment of prisoners).

enemy, but also preserves its noncombatant civilian population. However, the ICJ's decision in the Wall Advisory Opinion has now tacitly removed that incentive both from states and from fighters who want to commit combatant acts from a position that gives them the cover of civilians.

The ICJ's decision gives states less incentive to use their armed forces when attacking another nation because unless the attacks can be attributed to a state, the target state does not attain the right to respond in self-defense. In other words, a state now has to balance the benefits it will gain from attacking with clearly marked armed forces against the benefits it will accrue if it opts to work clandestinely[121] through non-uniformed forces that it can support from a distance and still accomplish its goals but that it also knows will not give the target state the right to respond in self-defense. If a state thinks it can act through some armed rebel group and accomplish its aggressive purposes without having to fear military retribution, it will most certainly be more tempted to act. The inevitable result will be states making the decision to use armed rebels rather than uniformed state forces. This decision will undermine the principle of distinction by placing more fighters on the battlefield who may or may not decide to distinguish themselves from the local population.

While this unfortunate result of the Court's decision may not further affect the complex situation in Israel and Palestine,[122] the Court should be prescient enough to project the impact of its rulings on other evident scenarios. In the end, there has

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121. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para 195 (June 27) (Holding:

> There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry our acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.).

See Michael N. Schmitt, *The Rule of Law in Conflict and Post-Conflict Situations: U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 751 (2004) (discussing the meaning of the Nicaragua case: "only attacks of a particular scale and of certain effects are 'armed attacks' justifying a military response in self-defense."). *But see* Advisory Opinion No. 131, supra note 15, at note 15 (making no mention of the scale of the attacks as a criterion for invoking self defense).

122. *See Lebanese talk show discusses UN team investigating Al-Hariri death*, BBC WORLDWIDE MONITORING, Sep. 10, 2005; *Italy, United States Reaffirm Solidarity Against Terror*, STATE NEWS SERVICE, July 13, 2005 (Israel faces both uniformed and non-uniformed armed groups that act along a spectrum of almost full state sponsorship to only limited financial or ideological backing. It is unclear that this situation will change drastically as a result of the ICJ's ruling).

been little direct impact on the situation in Israel as a result of the ICJ ruling,[123] but the effects of the Court's narrow construction of armed attack have already eroded the principle of distinction. This is exactly the opposite direction international law should be moving.[124]

Despite Professor Murphy's caution to the Court,[125] it has taken one more step down the path of undermining the principle of distinction, the step from tacitly approving to explicitly encouraging states to use armed militant groups who shun the rules of distinction and purposefully practice illegal battlefield tactics. This step occurred in the Case Concerning Armed Activities on the Territory of the Congo,[126] otherwise known as Congo v. Uganda.

B. Congo v. Uganda

The Case Concerning Armed Activities on the Territory of the Congo[127] arose from incidents that occurred between Uganda and the Democratic Republic of the Congo (DRC) from the late 1990s through 2004. In its application, the DRC alleged:

> acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity. ... Such armed aggression by Ugandan troops on Congolese territory has involved *inter alia* violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo, violations of international humanitarian law and massive human rights violations.[128]

In the counterclaims and defenses, Uganda alleged, among other things, that it was acting in self-defense in compliance with Article 51 of the UN Charter.

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123. Press Release, General Assembly Emergency Session Overwhelmingly Demands Israel's Compliance with International Court of Justice Advisory Opinion, U.N. DOC. GA/10248 (July 20, 2004). *See* Fr. Robert L. Araujo, S.J., *Implementation of the ICJ Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [do not] Make Good Neighbors?*, 22 B.U. INT'L L.J. 349, 387-96 (2004) (explaining the discussions concerning the General Assembly resolution, issued as a result of the Advisory Opinion, which was approved by a vote of 150 for, 6 against, and 10 abstaining).

124. Jensen, *supra* note 12, at 226.

125. Murphy, *supra* note 114, at 76 (writing:

> The Court would do well to heed these concerns. Its docket currently includes cases relevant to the *jus ad bellum*, such as those brought by the Democratic Republic of the Congo against Rwanda and Uganda. They are opportunities for the Court not only to decide concrete cases, but to help clarify in a cogent and thoughtful way the status of international law in its most critical area. States are willing to yield power to an international court of fifteen individuals only when they believe that the court's findings reflect higher levels of deliberation than are found within any one state's machinery. Findings that lack deep levels of reasoning, that fail to take account of and rebut divergent lines of thinking, are not salutary for any court, let alone one that holds itself up as the "supreme arbiter of international legality.").

126. Dem. Rep. Congo v. Uganda, *supra* note 16.

127. *Id.*

128. Application Instituting Proceedings, Armed Activities on the Territory of the Congo (Dem. Rep. Congo *v.* Uganda) (filed in the Registry of the Court June 23, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/ico/icoapplication/ico_iapplication_19990623.pdf.

Uganda claimed that their forces were initially in the DRC at the invitation of then-president Joseph Kabila in order to control "anti government rebels who were active along the Congo-Uganda border, carrying out in particular cross-border attacks against Uganda."[129]

Although President Kabila subsequently removed this consent,[130] Uganda claimed that the cross-border attacks by armed rebels continued and that Uganda was required to take armed actions in self defense into the DRC to prevent these armed attacks.[131] Uganda further claimed that this intervention was warranted as the rebels "fled back to the DRC,"[132] and that the DRC was unable to stop the attacks.[133] The situation left Uganda with no other option than to suffer the attacks or to act in self-defense. A document produced by the Ugandan High Command lists the five stated reasons justifying its actions in self-defense:

> 1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
>
> 2. To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
>
> 3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
>
> 4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
>
> 5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces."[134]

Given the purposes of this paper, only the fourth reason need be considered here.[135]

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129. Dem. Rep. of Congo v. Uganda, *supra* note 16, para. 45.

130. *Id.* at para. 53.

131. *Id.* at para. 92.

132. *Id.* at para. 109.

133. *See* Michael N. Schmitt, *The Rule of Law in Conflict and Post-Conflict Situations: U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 760 (2004) (arguing that where a state is unable or unwilling to prevent attacks from its territory, the attacked state "may non-consensually cross the border for the sole purpose of conducting counterterrorist operations, withdrawing as soon as it eradicates the terrorist threat.").

134. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 109.

135. *See* Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT'L L. 207, 217-221 (2002) (Paragraph 2 appears to give rise to a claim of anticipatory self-defense under customary international law). *But see* Dem. Rep. Congo v. Uganda, *supra* note 16, para. 143 (Uganda never made the claim of anticipatory defense. In any case, such a claim may not have mattered as the ICJ, in a broad statement, proclaimed, "The Court first observes that the objectives of Operation 'Safe Haven', as stated in the Ugandan High Command document, were not consonant with the concept of self-defence as understood in international law.").

The fourth reason alleges actual attacks across the border by armed insurgents that resulted in death or injury to Ugandans.[136] The importance of this allegation is that it raised an issue for the ICJ's consideration that they did not face previously, at least according to Judge Kooijman's separate opinion, in the Wall Advisory Opinion.[137] If Judge Kooijmans was right, the ICJ's decision in the Wall Advisory Opinion can be read as claiming that these attacks were not armed attacks because they were internal to Israel, coming from within its controlled territory. Therefore, they did not justify a response in self-defense under Article 51 of the UN Charter. No such claim of internal attacks is made here. Rather, the fourth justification in the High Command document alleges attacks by armed rebels that originated from the DRC.

Uganda argued that during the period of 1998 to 2003, "the changed policies of President Kabila had meant that co-operation in controlling insurgency in the border areas had been replaced by 'stepped-up crossed-border attacks against Uganda by the ADF which was being re-supplied and re-equipped by the Sudan and the DRC government.'"[138] The DRC admitted that these attacks had taken place but claimed that the ADF alone was responsible. The Court also acknowledged that the attacks took place and took notice of an independent report that "seem[s] to suggest some Sudanese support for the ADF's activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border... However, the Court does not find this evidence weighty and convincing."[139]

Though not explicitly stated, it appears the Court is not swayed by this information because it is only looking for evidence of armed attacks tied to a nation state. In concluding the section of the opinion concerned with the use of force, the Court states:

> It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate

136. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 143.

137. Advisory Opinion No. 131, supra note 15, para. 36 (separate opinion of Judge Kooijmans) (stating:

> The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self defence can be found in the second part of paragraph 139. The right of self defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 and 1373 refer to acts of international terrorism as constituting a threat to international peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel).

138. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 120.

139. *Id.* at para. 51.

> from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 *(g)* of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.
>
> For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate.[140]

By determining that attacks occurred by armed rebels across the border from the DRC into Uganda, and then finding that because there was no "satisfactory proof of the involvement" of the DRC or any other "state," no right to self-defense accrued to Uganda, the Court has taken the bad ruling in the Wall Advisory Opinion and advanced it one step further. By refusing "to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces," the Court has ignored the reality of the situation. Further, the Court not only passed up a chance to right a ship that was heading the wrong direction, but has instead added hurricane-force winds to the sails, as recognized by ICJ Judges Kooijmans and Simma.[141]

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140. *Id.* at para. 53.

141. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 27 (separate opinion of Judge Kooijmans) (stating:

> The Court seems to take the view that Uganda would have only been entitled to self-defence *against the DRC* since the right of self-defence is conditional on an attack being attributable, either directly or indirectly, *to a State* . . . But, as I already pointed out in my separate opinion to the 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Article 51 merely "conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years". I also observed that this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State).

Judge Kooijmans proposes an alternative based on his belief of current international law and grounded in the realities of the current world. He writes:

> If the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is

This holding has the effect of encouraging every government that has aggressive designs on its neighbor to covertly create, train, and supply non-uniformed, armed rebels within its territory because even if the support meets the "direct or indirect involvement" standard first articulated in Nicaragua.[142] The current Court's unwillingness to address the quantum of attack necessary to trigger the right to self-defense is a step backward from the standard of "acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack"[143] pronounced in Nicaragua. In other words, by making discernable "direct or indirect" involvement by a state a necessary "precondition" to the use of force in self-defense, the Court has given aggressive states a clear incentive to support, even encourage, attacks by armed rebel groups because they will not invoke the targeted state's right to respond in self-defense against either the rebels or the supporting state.

As a continuation of the Wall Advisory Opinion, this decision has devastating effects on the principle of distinction. By prohibiting a response in self-defense to external armed rebel attacks, regardless of the quantum, the Court encourages rogue states to carry out their illegal aggressive designs through un-uniformed, armed rebels who are virtually indistinguishable from the local population save for actually shooting their weapons in the attack. Because of the Court's regrettable decision, these rogue actors now see a way to orchestrate large scale armed violence without creating a right of self-defense for their victims and simultaneously increasing the survivability of their attackers by clothing them in the protections of civilians. This is truly a catastrophic development given modern battlefield tendencies.

As recognized by the Security Council in their resolutions 1368 and 1373,[144] the world is not the same place it was prior to September 11, 2001. Since those attacks, the major threats to international peace and security have not centered in only state actors, but also in non-state actors, many of whom have an international reach.[145] The standard for the exercise of self-defense by a state ought to be

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no attacker State, and the Charter does not so require).

See also Dem. Rep. Congo v. Uganda, *supra* note 16, para. 13 (separate opinion of Judge Simma) (concurring with Judge Kooijmans' understanding of current international law and writing:

> I also subscribe to Judge Kooijmans' opinion that the lawfulness of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality?).

142. *See* Murphy, *supra* note 114, at 65-66.

143. Nicar. v. U.S., *supra* note 121, para. 103-104; Dem. Rep. Congo v. Uganda, *supra* note 16 (separate opinion of Judge Simma).

144. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/Res/1373 (Sept. 28, 2001). *See also* Vincent-Joel Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615, 627 (2005) (arguing that the international community is moving to a system where states are held indirectly liable for the actions of entities within their borders).

145. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 8-13 (September, 2002), *available at http://www.whitehouse.gov/nsc/nss/2006.*

"armed attack," from whatever source it springs. Only under this standard can states adequately protect themselves against modern threats.[146]

More importantly for this paper, utilizing this standard of armed attack, regardless of whether it is state sponsored or not, will also reverse the continuing trend of incentivizing states to "use" forces other than their nation's uniformed forces who do not feel compelled to distinguish themselves from the local populace in order to avoid giving rise to the right of self-defense. This trend began two decades ago with the Nicaragua decision,[147] but the ICJ has taken a definite turn in the wrong direction with their decision in the Wall Advisory Opinion and digressed even further with the recent Congo v. Uganda case. It is not coincidental that during this same time period since Nicaragua, there has been a rise in the use of law of war provisions as a tool against legally compliant nations in battle. This type of warfare is known as lawfare.[148]

IV. THE EROSION OF THE PRINCIPLE OF DISTINCTION AND THE RISE OF LAWFARE

Modern warfare is no longer typified by the arrangement of major armies along a two dimensional battle line.[149] In fact, modern warfare has even moved beyond the concept of three-dimensional "air land battle"[150] to the 360-degree concept of the common operational environment[151] where attacks can come from any direction and from any source. This new battlespace concept is intricately entwined with the concept of asymmetrical warfare.

Asymmetrical warfare describes the modern reality that wars are not being fought between equal or nearly equal armies on a defined battlefield. As now Major General (MG) Charles Dunlap, Jr.[152] writes, "In broad terms, 'asymmetrical' warfare describes strategies that seek to avoid an opponent's

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146. *See* Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH J. INT'L L. 513, 540-44 (2003) (arguing this point specifically in connection with defending against cross border attacks from non-state actors that amount to armed attack).

147. Dem. Rep. Congo v. Uganda, *supra* note 16, para. 21 (separate opinion Judge Kooijmans).

148. *See Lawfare, The Latest in Asymmetries*, Council on Foreign Relations, Mar. 18, 2003, *http://www.cfr.org/publication.html?id=5772* (defining lawfare as "a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.").

149. *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 730 (2004) ("[E]ven the battles of the nineteenth century rarely fit this paradigm, and modern conflict fits this paradigm still less well."); Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 743 (2005) ("Wars between powerful states, those conflicts that prompted the development of humanitarian law, are increasingly rare. Instead of large-scale combat between organized militaries, modern warfare is becoming asymmetrical. Insurgencies, not armies, are the norm.").

150. *See* John J. Romjue, *The Evolution of the AirLand Battle Concept*, AIR U. REV. (1984), *available at* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1984/may-jun/romjue.html.

151. *See The Contemporary Operational Environment (COE)*, OPERATION ENDURING FREEDOM TACTICS, TECHNIQUES AND PROCEDURES HANDBOOK NO. 02-8, STRATEGYPAGE.COM, *available at http://www.strategypage.com/articles/operationenduringfreedom/chap1.asp* (last visited Apr. 2, 2006).

152. *See* Official Website of the United States Air Force, *http://www.af.mil/bios/bio.asp?bioID=5293*
(Showing that at the time of this writing, MG Charles Dunlap, Jr. had recently been promoted to the rank of Major General and assigned as Deputy Judge Advocate General of the Air Force).

strengths; it is an approach that focuses whatever may be one sides comparative advantages against their enemy's relative weaknesses."[153] In this type of conflict, the disadvantaged party is unlikely to succeed by squaring off with its opponent in a typical force on force military struggle. Instead, the disadvantaged party must seek to use the comparatively low-tech tools at its disposal to gain the comparative advantage.[154] One of the most tempting and potentially successful low-tech tools in this fight is international law, particularly the principle of distinction.[155]

The use of law as a tool of warfare is not inherently good or bad. The laws of war have generally had a mitigating effect on warfare. But, like any tool of warfare, "it is how the law is used that defines its nature and value."[156] As David Rivken and Lee Casey argue, "international law may become one of the most potent weapons ever deployed."[157] In this form of warfare, a group or state that is facing a nation committed to comply with the laws of war will choose to openly violate the law not only for the tactical advantage gained but for the strategic benefit that arises.[158] The compliant nation, still committed to law of war compliance, is thus disadvantaged.

This form of asymmetrical warfare has come to be known as "lawfare," or "the use of law as a weapon of war."[159] It takes many forms but is always pointed at striking where a more superior but legally bound military force is more constrained than a less superior but legally unconstrained force.[160] The recent war in Iraq illustrates many examples of this,[161] including attacking from protected

153. Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. Leg. Stud. 71, 72 (1997/1998). *See also* W. Chadwick Austin and Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 293-94, 301-02 (2006).

154. Michael N. Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction*, 1, 2, 12-13, Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative Briefing Paper (2003), *reprinted in* INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS: CHANGES AND CHALLENGES (Lausanne: Editions Interuniversitaires Suisses, Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005), *available at* http://www.michaelschmitt.org/Publications.html.

155. *See* Michael N. Schmitt, *The Principle of Discrimination in the 21st Century*, 2 YALE HUM. RTS. & DEV. L.J. 143, 157 (1999) (discussing the effects of technology on the principle of distinction and arguing that as the gap widens between the "haves and have-nots," the asymmetrical disadvantage of the have-nots will tempt them to abandon the principle of distinction).

156. Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 7 (2006).

157. Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 4, 5 (2001), *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf (last visited June 28, 2004).

158. *See* Reynolds, *supra* note 2, at 102-03 (stating, "[P]ublic support can be lost based on the number of civilian casualties. A March, 2003 Gallup poll indicates 57 percent of those surveyed would oppose a war in Iraq because 'many innocent Iraqi citizens would die.'").

159. *See* Dunlap, Jr., *supra* note 157; Schmitt *supra* note 154, at 17. *See also* Austin & Kolenc, *supra* note 153, at 306-310.

160. *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, 673-74 (2004).

161. *See Announcing the Inaugural Combined Arms Center Commanding General's 2006 Special*

places and using protected places or objects as weapons storage sites,[162] fighting without wearing a proper uniform,[163] using human shields to protect military targets,[164] using protected symbols to gain military advantage,[165] and murdering of prisoners or others who deserve protection.[166] In each of these cases, an inferior force used the superior force's commitment to adhere to the law of war to its tactical advantage.

Unfortunately, the most typical and also most damaging form of lawfare in recent conflicts has been the decision of disadvantaged combatants to not distinguish themselves from the local populace.[167] And it appears that this trend is on the rise, even amongst major military powers.[168] As MG Dunlap has written, "If international law is to remain a viable force for good in military interventions, lawfare practitioners cannot be permitted to commandeer it for malevolent purposes."[169] Regrettably, the aforementioned ICJ decisions have made it much easier for practitioners of lawfare to use the law of war against compliant nations. Rebecca Kahan highlights this point: "For years, the international community has embraced the idea that targeting civilians violates principles of international

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Topics Writing Competition: "Countering Insurgency," HEADQUARTERS GAZETTE (Society for Military History, Leavenworth, KS), Winter 2006, at 12, *available at http://leavenworth-net.com/lchs/12658%Headquarters.pdf* (highlighting the U.S. Army's recognition of the seriousness of the use of lawfare in Iraq. In a recent announcement from the Combined Arms Center at Ft. Leavenworth, Kansas, the Military Review is sponsoring a writing competition seeking articles specifically on issues dealing with counter insurgency, including "lawfare." The announcement begins by stating that "The Army absolutely needs to understand more about counterinsurgency—nothing less than the future of the civilized world may depend on it.").

162. *See* Tony Perry & Rick Loomis, *Mosque Targeted in Fallouja Fighting*, L.A. TIMES, April 27, 2004, at A1.

163. *See Coalition Forces Continue Advance Toward Baghdad*, CNN LIVE EVENT/SPECIAL, March 24, 2003.

164. *See The Rules of War are Foreign to Saddam*, OTTAWA CITIZEN, March 25, 2003; David Blair, *Human Shields Disillusioned with Saddam, Leave Iraq after Dubious Postings*, NATIONAL POST (CANADA), March 4, 2003, *available at* http://www.FPinfomart.ca.

165. Rivkin & Casey, *supra* note 27, at 65.

166. *See* Robert H. Reid, *South Korean Hostage Beheaded in Iraq*, TORONTO STAR, June 23, 2004, at A1, *available at* WL 6081419; *See also* Michael Sirak, *Legal Armed Conflict*, JANE'S DEFENSE WEEKLY, Jan. 14, 2004, at 27 (listing a number of violations of the law of war committed by Iraqi military and paramilitary forces).

167. *See* Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 735 (2005) (stating, "[t]he Principle of Distinction is violated across the world, often openly so, and that problem is getting worse." The author then argues for replacing the principle of distinction with the Principle of Culpability which is based on each individual's actions rather than his status as a noncombatant).

168. *See* Col Wang Xiangsui, Chinese Air Force, *as quoted by* John Pomfret in *China Ponders New Rules of 'Unrestricted Warfare,'* WASH. POST, Aug. 9, 1999, at 1, *quoted in* Dunlap, *supra* note 158, at 36 (where a senior member of the Chinese Air Force recently stated "War has rules, but those rules are set by the West . . . if you use those rules, then weak countries have no chance . . .We are a weak country, so do we need to fight according to your rules? No.").

169. Dunlap, *supra* note 157, at 36; *See also* Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 ARMY LAW. 1, 16 (2006) (arguing that strategic lawyering can be a force to fight the effects of lawfare).

law."[170] She then contrasts the actions of those who practice lawfare; "terrorist organizations have adopted this strategy [of violating international law] as part of their policy."[171] The fact that terrorists and others find sympathy for the use of their tactics from the ICJ and others only emboldens them. It also emboldens state leaders who cannot otherwise use the military instrument in their aggressive designs for fear of military retribution.

As a result of the Wall and Uganda decisions by the ICJ, state leaders have incentive to "use" other armed groups to accomplish their military attacks on neighbors rather than their official uniformed armed forces because the latter would trigger the target nation's right of self-defense. On the other hand, if they maintain their support to armed groups below a standard that the ICJ will attribute to the state, the state can effectively work toward the destabilization of a neighboring country without fear of a legal response in self-defense. If an illegal response does come, the nation cannot only respond in self-defense, though the original aggressor, but also claim to be the legally compliant state. The clear result of this is more fighters on the battlefields of the world who are not distinguished or distinguishable from the local populace. This can only result in more civilian casualties and greater derogation from the laws of war.

V. THE NEED FOR A RETAINING WALL TO STOP THE EROSION

The erosion of the principle of distinction poses a danger too great for the international community to sit idly. Steps must be taken to incentivize all battlefield fighters to comply with the laws of war, particularly with those rules that distinguish them from the local populace. Some such incentives have already been proposed.[172] However, incentives on an individual basis need to be augmented by institutional incentives that remove the incentives of states to derogate from this fundamental rule.

The first remedial action that must be taken is for the ICJ to reverse its misapplication of the concept of armed attack. Regardless of whether customary international law ever recognized armed attack as restricted only to states, it does not and should not now.[173] As clearly implied by the UN Security Council in resolutions 1368 and 1373[174] and confirmed by Judges Kooijmans and Simma in their separate opinions,[175] armed attacks invoke a state's right of self defense

170. Kahan, *supra* note 110, at 827-28.

171. *Id.*

172. *See generally* Jensen, *supra* note 12 (proposing five incentives to encourage combatants to distinguish themselves from civilians).

173. *See* Schmitt, *supra* note 146, at 536-540.

174. *See* Kathleen Renee Cronin-Furman, *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship*, 106 COLUM. L. REV. 435, 463 (2006) (arguing that the conflict between the ICJ and Security Council is not new and that "[t]he ICJ's failure to conform its reasoning to international political realities, as evinced in the Wall Opinion, seriously threatens the ICJ's credibility." The author proposes, "According the Security Council's pronouncements primacy in the consideration of customary law would be an effective way to resolve this issue. It would preserve the ICJ's judicial discretion while at the same time recognizing the Security Council's paramount importance to the maintenance of international peace and security.").

175. *See* Dem. Rep. Congo v. Uganda, *supra* note 16 (separate opinions of Judge Simma and Judge

whether they are generated by a state or not. Armed attack should be understood as a quantum requirement, not a source requirement.[176] Any other reading would incentivize the use of irregulars to do what regular forces could not, striking at the heart of the fundamental principle of distinction in international law and significantly degrade fundamental protections currently afforded to civilians.

Secondly, the Security Council must issue a more explicit and definitive statement on the quantum nature of armed attack. As the Security Council is increasingly confronted with threats to international peace and security by the onslaught of terrorism and similar multinational non-state actors, it is in the Security Council's interest, and the interest of all United Nations' member states, to have a definitive statement on this issue. As such, the Security Council should recognize a state's inherent right to defend itself against attack so long as the response is proportional and necessary. The Security Council could easily reconfirm these bedrock principles and apply them in the light of the current international system.

Finally, organizations such as the ICRC that identify protection of noncombatants and civilians as part of their charter[177] ought to encourage the enactment of laws that will advance this vital interest. As Professor Reisman has pointed out,[178] those who have advocated for GPI should now reflect on its results. In an effort to give protections to certain battlefield actors, they have dramatically degraded the principle of distinction. A better approach is to insure that noncombatants and civilians are protected, even if it means that some battlefield actors who choose to participate without meeting the requirements of GPW Article 4, are not given combatant privileges. It is not an overly arduous requirement that all battlefield actors distinguish themselves to be viewable at a distance in some way. This does not even require a uniform, merely a distinguishing marking that sets battlefield fighters apart from civilians.[179] The ICRC should take the lead on revisiting this issue amongst NGOs and work toward reestablishing the safety wall around civilians as opposed to eroding those protections.

While these three recommendations will certainly not prevent any future civilian casualties, they would help establish a clear legal standard for state actions that would remove the existing incentives to "use" armed groups to avoid giving

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Kooijmans).

176. *See* Schmitt, *supra* note 121, at 750-52 (discussing the effects basis for understanding the right of self-defense in the ICJ's decision in Nicaragua).

177. See the ICRC Mission Statement, *available at* http://www.icrc.org/HOME.NSF/060a34982cae624ec12566fe00326312/125ffe2d4c7f68acc1256ae300394f6e?OpenDocument, which states:

> The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

178. Reisman, *supra* note 17, at 856.

179. Ferrell, *supra* note 13, at 106-09.

rise to the right of self-defense. Such a move would enhance the principle of distinction and reinvigorate the protections provided to civilians on the battlefield.

VI. CONCLUSION

The recent erosion of the principle of distinction has certainly been one of the factors leading to an increasing number of noncombatant deaths on modern battlefields. The international law principle that makes this conduct illegal is firmly rooted in the law of war but has been weakened by provisions of GPI that are designed to provide greater protections to battlefield fighters. As history has borne out, trying to widen the group who gain combatant protections has inevitably weakened the protections provided for noncombatants and civilians and brought more innocent bystanders within the hostile fire of warring parties.

The recent decisions of the ICJ have taken this derogatory step even further. In the Wall Advisory Opinion, the ICJ held that "numerous indiscriminate and deadly acts of violence against its civilian population"[180] by a non-state actor from within its own territory did not give Israel the right to respond in self-defense, even if that response was non-lethal. The ICJ went a step further in the Congo v. Uganda ruling when it immunized any action from raising the right of self-defense, regardless of the scale, as long as it was committed by a non-state entity or group. This holding gives tremendous incentive to states that are aggressive toward their neighbors to support and even assist armed groups who are carrying out significant attacks, attacks which would give rise to the right of self-defense if done by government armed forces.

These decisions, taken despite prior UN Security Council resolutions proclaiming otherwise, dramatically erode the principle of distinction. They not only remove the incentive to comply with the law of war, but they actually give a disincentive to do so because it gives the target state a legal right to respond with proportional armed force. The result will be fewer and fewer marked combatants on modern battlefields and greater and greater civilian casualties who get inadvertently mixed in with those who are engaging in hostilities by relying on the protections of the noncombatant identity to pursue their militant goals.

These unfortunate erosions of the law of war aggravate the asymmetrical warfare approach of lawfare, or using the law of war as a weapon against a compliant enemy. Lawfare is a growing methodology to warfare, contemplated not only by small nations and groups, but also by large armies. Sadly, the ICJ's decisions add a false legal gloss to these actions. If this trend is allowed to continue, the principle of distinction will soon dwindle into a meaningless rule.

The Security Council must take the lead on more clearly and explicitly stating the quantum nature of armed conflict rather than reliance on the source of the action for qualification. The ICJ must follow the Security Council's lead and reverse the direction in which the Court is heading by redefining armed attack to be an effects-based test, rather than a claim that can only be invoked if the attacker is a state actor. Finally, the ICRC must take the lead in reevaluating its advocacy

180. Advisory Opinion No. 131, *supra* note 15, at para. 141.

of a principle that supplies greater protections to all battlefield fighters but has the practical effect of endangering civilians. The principle of distinction must remain the foundational principle of the law of war. The Israeli Wall must be torn down and the entry point for lawfare blocked. In its place, a bridge should be built, allowing civilians to cross back into a realm where they are protected and their safety is legally enshrined.

DELINEATING THE INTERESTS OF JUSTICE

HENRY LOVAT*

INTRODUCTION

The Chief Prosecutor (the Prosecutor)[1] of the International Criminal Court (ICC) has the discretion to forego investigations as well as prosecutions in the "interests of justice." This mechanism is one means by which the demands of the nascent international criminal law regime could be reconciled with the desirability of achieving stable and secure peace agreements and democratic transitions. However, there has been some debate as to the correct interpretation of the phrase "interests of justice." This paper reviews several of the suggestions put forward, with a particular focus on the approach taken by Human Rights Watch (HRW) in a recent policy paper.

There are advantages to the approach taken by HRW in focusing on maintaining the legitimacy of the Office of the Prosecutor (OTP) and of the ICC as an institution. Nonetheless, this study concludes that it would be inadvisable for the "interests of justice" to be construed in such a manner as to effectively render the UN Security Council (UNSC) the sole body competent to decide whether or not any investigation or prosecution would be in the interests of justice. Rather, it would seem preferable for this discretion to remain within the ICC, circumscribed by regulations designed to ensure that the discretion is exercised in such a manner as to maintain, and, if at all possible, bolster the legitimacy and credibility of the ICC.

I

The Rome Statute of the ICC (the Rome Statute) gives the Prosecutor discretion to decide not to initiate either an investigation or a prosecution on the grounds that to proceed would be contrary to the interests of justice. Under Article 53(1), where there is a reasonable basis to believe that an alleged crime falls within the jurisdiction of the court and the situation in question would otherwise be

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1. References to the Prosecutor are to the Chief Prosecutor personally: at the time of writing, Luis Moreno-Ocampo. Where appropriate, reference is also made to the office headed by the Prosecutor: the Office of the Prosecutor (OTP). The OTP is one of the four organs of the ICC, alongside the Registry, the Presidency and the Judicial Divisions.

admissible for investigation under the statute, the Prosecutor may nevertheless decline to initiate an investigation on the grounds that an investigation "would not serve the interests of justice,"[2] having taken into account the gravity of the crime in question and the interest of the victims. In similar fashion, Article 53(2) allows the Prosecutor to conclude that there is not a sufficient basis for a prosecution when a prosecution would not be in the "interests of justice."[3] In either case, where the Prosecutor declines to investigate or prosecute in such circumstances, he or she is required to notify the pre-trial chamber of this determination and of the reasons for the decision.[4] The pre-trial chamber is then entitled to review the Prosecutor's decision, and, where the chamber undertakes a review, the decision of the Prosecutor will only be effective where it is confirmed by the pre-trial chamber.[5]

The "interests of justice" thus allow the Prosecutor significant scope to exercise discretion as to whether or not to investigate or prosecute a potential case. While this may be welcome in many circumstances, the relatively unfettered extent of this discretion has given rise to much debate. One dispute centers on whether or not the Prosecutor should decline to investigate or prosecute where prosecutorial intervention may have an undesirable effect on peace negotiations or on a domestic transitional justice mechanism, such as a truth and reconciliation commission.[6] Another dispute centers on whether the Prosecutor can or should use his or her discretion to decide to respect a domestic decision to grant amnesties to perpetrators of crimes that would otherwise fall within the remit of the ICC.[7]

The risk that the ICC would foreclose the use of truth commissions and other transitional justice mechanisms falling short of prosecution (particularly in cases involving the granting of amnesties) has long been recognized.[8] Some authors, moreover, have expressed concern at the prospect that criminal trials might come to be viewed as the only acceptable means of addressing serious and extensive

2. Rome Statute of the International Criminal Court art. 53(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. *Id.* at art. 53(2). (specifying that a determination as to the interests of justice should be made "taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.").

4. *Id.* at art. 53(1), 53(2).

5. *See id.* at art. 53(3).

6. *See, e.g.*, Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 481-85, 504-5 (2003); Noah Weisbord, *When Peace and Justice Clash*, INTERNATIONAL HERALD TRIBUNE, Apr. 29 2005, *available at* http://www.iht.com/articles/2005/04/28/opinion/edweis.php.

7. *See* Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695, 699-718 (2005). *See also id.* at 483-85, 489-96; Richard J. Goldstone & Nicole Fritz, *'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN JOURNAL OF INTERNATIONAL LAW 655, 659-60 (2000).

8. *See* Antonio Cassese, et al., *Round Table: Prospects for the Functioning of the International Criminal Court*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 300 (Mauro Politi & Giuseppe Nesi eds., 2001).

violations of human rights.[9] A declaration by the international community at large that criminal prosecution was henceforth to be the only acceptable means of dealing with acts deemed criminal under international law would justifiably be thought presumptuous.[10] Against the backdrop of such concerns, Kofi Annan declared in 1998 that it was "[i]nconceivable that... the Court would seek to substitute its judgment for that of a whole nation, which is seeking the best way to put a traumatic past behind it and build a better future."[11] Moreover, as seen from a purely consequentialist standpoint, the risk of insisting on criminal prosecutions in all cases must be balanced against the possibility that this could result in the commission of further atrocities.[12]

Conceding that it would be unfortunate if the ICC were to stand in the way of peace agreements and/or national transitional justice initiatives, it has been argued that use of the Prosecutor's discretion under the rubric of the "interests of justice" would be the most straightforward means for the court to avoid becoming involved in such situations.[13] One justification for the use of prosecutorial discretion in these circumstances is that the term "justice" can bear many differing meanings depending on context.[14] Also, the broader interests of society would certainly militate strongly against prosecutions where the threat of criminal prosecution might jeopardize a democratic transition.[15]

In line with the considerations outlined above, the OTP published draft regulations in 2003 indicating that the Prosecutor might be willing to take into account in determining the interests of justice in any given case "various national and international efforts to achieve peace and security."[16] While the draft

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9. *See, e.g.*, ALEX BORAINE, A COUNTRY UNMASKED 400 (Oxford U. Press 2000) ("[I]t would be a tragedy if all future 'interventions in post-conflict societies were to take the form of trials and prosecutions only.").

10. *See* Robinson, *supra* note 6, at 483.

11. Kofi Annan, U.N. Sec'y Gen., Address at the University of the Witwatersrand (Sept. 1, 1998), *quoted in* Charles Villa-Vicencio, *Neither too much, nor too little justice: Amnesty in the South African context*, 49 MEDIA DEVELOPMENT 26 at 29, *available at* http://www.wacc.org.uk/wacc/content/pdf/2437.

12. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2620 (1991) ("[A]lmost all who think momentarily about the issue are not prepared to defend a policy of punishing these abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses.").

13. *See, e.g.*, Robinson, *supra* note 6, at 483 (stating "the most likely point at which the ICC will determine whether to defer to national programmes is pursuant to the discretion of the Prosecutor to decline to prosecute when it would not be in the 'interests of justice'... there may be exceptional circumstances where it would not be in the interests of justice to interfere with a reconciliation mechanism, even though that mechanism falls short of prosecution of all offenders.").

14. *See* Goldstone & Fritz, *supra* note 7, at 662. (explaining "the word 'justice' is demanding... [y]et few would aver that it is 'demanding' in the sense that it is always retributive.").

15. *Id.* at 663 (explaining that "[o]n occasions the interests of justice might compel that the transition to democracy not be imperilled and that the threat of prosecutions and punishment not be brought to bear.").

16. International Criminal Court, *Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593 (2005)*, 13 December 2005, at 6, *available at* http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf.

regulations themselves do not give any more specific elucidation, a footnote to the draft suggests that the experts consulted in developing the guidelines leaned towards including consideration of circumstances in which an investigation or prosecution might "exacerbate or otherwise destabilize a conflict situation"[17] or "seriously endanger the successful completion of a reconciliation or peace process."[18] More recently, in considering whether or not the Prosecutor ought to proceed with investigations and with potential prosecutions relating to the conflict between the Lord's Resistance Army and the Ugandan government, some have taken the view that the perseverance of the Prosecutor in issuing indictments at a sensitive time during negotiations could have adverse effects on the outcome of the negotiations and, as such, would not be in the "interests of justice."[19]

II

Perhaps unsurprisingly, some maintain that it is not appropriate for the Prosecutor to take such factors into account in determining the scope of the interests of justice. Some of the legal and policy considerations relevant to this view are articulated particularly well in a 2005 Human Rights Watch policy paper entitled "The Meaning of 'The Interests of Justice' in Article 53 of the Rome Statute" (the HRW Paper).[20] The HRW Paper supports the view that the Prosecutor should adopt a narrow understanding of the term "interests of justice" which would preclude him or her from electing not to investigate or prosecute on the basis of on-the-ground developments including peace negotiations and non-judicial transitional justice processes. The HRW Paper's conclusion relies on a number of observations.

Firstly, the authors of the HRW Paper note that under the regime established by the Vienna Convention on the Law of Treaties (VCLT), a treaty should be interpreted in accordance with the ordinary meaning of its terms in context and its object and purpose.[21] Noting that the *travaux preparatoires* of the Rome Statute do not reflect any agreement as to the correct understanding of the term "interests of justice," HRW suggests that reference should be made to the object and purpose of the Rome Statute.[22] Using the preamble of the treaty as a basis, the authors of the HRW paper then argue that the self-evident object of the treaty is to end impunity for the crimes within the court's jurisdiction and that the court was

17. International Criminal Court, *Draft Regulations of the Office of the Prosecutor*, 3 June 2003, at 47, *available at* http://www.icc-cpi.int/library/organs/otp/draft_regulations.pdf.

18. *Id.*

19. *See, e.g.*, Josefine Volqvartz, *ICC Under Fire Over Uganda Probe*, Feb. 23, 2005, http://www.globalpolicy.org/intljustice/icc/2005/0223iccfire.htm.

20. *See generally* Human Rights Watch, *Policy Paper: The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute*, at 2 (June 2005), *available at* http://hrw.org/campaigns/icc/docs/ij070505.pdf (explaining that "the prosecutor may not fail to initiate an investigation or decide not to go from investigation to trial because of developments at the national level such as truth commissions, national amnesties, or the implementation of traditional reconciliation methods, or because of concerns regarding an ongoing peace process, because that would be contrary to the object and purpose of the Rome Statute.").

21. *Id.* at 3.

22. *Id.* at 3-4.

established with the purpose of prosecuting the most serious of these crimes.[23] Drawing on this interpretation, they conclude that it would be contrary to the object and purpose of the treaty to construe the "interests of justice" in a manner that would allow amnesties and other domestic developments to influence a decision as to whether or not to proceed with an investigation or prosecution.[24]

Second, the authors of the HRW Paper maintain that the Rome Statute implicitly gives the United Nations Security Council the prerogative of preventing or halting an investigation or prosecution for "political" reasons.[25] Noting that Article 16 of the Rome Statute gives the UNSC the right to stop the Prosecutor taking action in respect of investigations or prosecutions, and that the Prosecutor is an apolitical officer of the ICC, the authors of the HRW paper draw the conclusion that the drafters of the treaty intended the UNSC to retain the decisive role in determining whether or not it is appropriate to halt or prevent prosecutorial action in order to forestall untoward political fallout.[26] In support of this position, the authors of the HRW Paper cite commentators who claim that "the duty and power to guarantee international peace and security does belong to the Security Council."[27] The authors go on to conclude that the wording of the Rome Statute requires the adoption of a narrow interpretation of the phrase "interests of justice," noting the purported allocation of responsibility to the UNSC as well as the desirability on policy grounds of the Prosecutor's continuing to remain uninvolved in ostensibly non-legal issues.[28]

The authors of the HRW Paper also note that the Rome Statute should be construed in light of the relevant rules of international law.[29] A number of commentators are cited to the effect that there is a customary rule of international law (and potentially also a peremptory norm) requiring the prosecution of persons responsible for committing serious international crimes, including genocide and war crimes. The authors of the HRW Paper also note (citing recent state practice) that there is a developing rule in international law prohibiting the granting of amnesties by states in respect of serious international crimes. On this basis, the paper concludes that "international law does not permit"[30] the exemption from prosecution of the most serious crimes under international law and that "[t]he logical construction of Article 53 that is consistent with both the object and purpose of the Rome Statute and the requirements of international law is a narrow one."[31]

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23. *Id.* at 5-6.

24. *Id.* at 3-6.

25. *Id.* at 7.

26. *Id.* at 8.

27. Giuliani Turone, *Powers and Duties of the Prosecutor*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1137, 1143 (Antonio Cassese et al. eds., 2002).

28. *See* Human Rights Watch, *supra* note 20, at 7-9.

29. *Id.* at 9-14.

30. *Id.* at 11.

31. *Id.* at 14.

In addition to the legal issues highlighted above, the authors of the HRW Paper also argue that policy concerns militate in favor of the Prosecutor adopting a narrow reading of the phrase "interests of justice."[32] The authors argue that allowing the prospects for peace agreements or amnesties to be relevant to decisions as to whether or not to launch investigations or prosecutions may: 1) affect the behavior of local actors, and in particular, result in undesirable pressure being put on the Prosecutor to investigate or prosecute in a situation dependent on the prevailing political situation at any given time; and 2) undermine the legitimacy of the Prosecutor and of the court itself, if similar situations are seen to be treated dissimilarly on the basis of factors that are not integrally related to the acts in question (i.e., the alleged crimes). Moreover, citing examples drawn from the Balkans and West Africa, the authors of the HRW Paper note that the enforcement of justice itself (in the form of investigations, indictments and presumably, prosecutions) can also have a positive effect on the prospects for peace and stability through marginalizing and stigmatizing those responsible for mass violations of human rights and the commission of serious international crimes.[33] As such, the HRW Paper concludes, a narrow reading of the phrase "interests of justice" is warranted.[34]

III

The position taken in the HRW Paper is far from uncontested. Indeed, some commentators simply disagree with the conclusion that a narrow reading of the term "interests of justice" is required under international law and the VCLT.[35] Darryl Robinson, for example, comes to a polar opposite conclusion, maintaining that the "interests of justice" must be construed broadly, taking into account the ordinary meaning of the text and the object and purpose of the Rome Statute.[36] Similarly, despite the existence of an international legal duty on states to prosecute many of the crimes falling within the jurisdiction of the ICC, this may not necessarily result in a similar duty being placed on the ICC. The court is neither a party to the relevant treaties, nor necessarily a subject of customary international law in this regard: Article 21 of the Rome Statute states only that the ICC is bound to apply "where appropriate, applicable treaties and the principles and rules of international law."[37] It seems far from certain, therefore, that the exercise of discretion by the Prosecutor requires reference to or application of all such treaties, principles and rules in all cases. Moreover, treaty provisions and customary rules binding individual states may not bind the ICC and its constituent organs to a similar extent.[38]

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32. *Id.* at 14-15.

33. *Id.* at 15.

34. *Id.* at 14-15.

35. *See, e.g.*, Robinson, *supra* note 6, at 504-5.

36. *Id.* at 488.

37. Rome Statute, *supra* note 2, at art. 21(1)(b).

38. It seems to be generally accepted that international organizations, and especially bodies concerned with ensuring and developing the rule of law internationally, should abide by the relevant

Concerns have also been raised with regard to certain other propositions put forward in the HRW Paper. For example, in view of the working practices of the UNSC, it seems unsustainable to maintain that the drafters of the Rome Statute intended to allocate to that body the prerogative of intervening to forestall investigations/prosecutions in deference to national democratic preferences or peace initiatives. Moreover, while the authors of the HRW Paper may be correct in observing that "[j]ustice itself can have tremendous value in contributing to peace and stability,"[39] this will not necessarily be the case in every instance: it is readily conceivable that in certain circumstances the importance of obtaining peace and stability will militate strongly against prosecution in front of the ICC. In addition, the view that the "interests of justice" can only be given a narrow construction would seem to support the position that the ICC ought to undertake a potentially large number of prosecutions. This may be neither desirable nor practicable. Last, were an obligation always to prosecute certain serious international crimes to exist, it is difficult to comprehend how the authors of the HRW Paper can reasonably suggest that it would be acceptable for the UNSC to forestall prosecutions.

The above difficulties notwithstanding, one key advantage of the narrow interpretation put forward in the HRW Paper should be noted: this interpretation would limit the likelihood of the Prosecutor electing not to prosecute for reasons that might not be fair and non-discriminatory.[40] As pointed out by Allison Danner, the manner in which prosecutorial discretion is exercised may be a vital element in generating and maintaining the legal legitimacy of the ICC, where legitimacy is understood to underpin the court's exercising of authority.[41] The maximizing of the values of impartiality and fairness in all aspects of the court's work, including the exercise of discretion by the Prosecutor, should therefore strengthen the legitimacy of the court as an institution. This strengthening can be considered desirable both in terms of developing a working international rule of law and in furthering the court's objectives of ending impunity for acts falling within its jurisdiction.

Nevertheless, certain elements of the arguments put forward in the HRW Paper require further consideration. The allocation of the discretion not to prosecute on political grounds to the UNSC, in particular, appears problematic. [42] In allowing the UNSC such a role, the authors seem to recognize that it would be unfortunate if ICC investigations or prosecutions could not be forestalled on the

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rules of international law. This point also seems to be assumed by Human Rights Watch. Nonetheless, it would seem odd as a matter of public international law to treat the ICC as a 'state party' for the purposes of treaty-observance etc. (i.e., The ICC is neither a state nor a party to many of the international legal agreements that are binding on states. Moreover, the ICC may simply lack many of the capacities of states to comply with international treaty and/or customary law). *See* Human Rights Watch, *supra* note 20, at 9-14.

39. Human Rights Watch, *supra* note 20, at 15.

40. *See* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 536 (2003).

41. *Id.* at 535.

42. *See* Human Rights Watch, *supra* note 20, at 7–8.

basis of changing facts on the ground. However, consideration of its manner of working, as well as of its mandate, suggests that the UNSC is ill-suited to such a role that HRW suggests it adopt. The UNSC is, as the authors of the HRW Paper recognize, a political body.[43] As such, it might not be hamstrung by the legal considerations that restrict a court. However, the UNSC should not be allocated a legal responsibility under the Rome Statute.

Firstly, it should be appreciated that a close reading of Article 16 of the Rome Statute does not place on the UNSC any duty whatsoever.[44] Rather, the UNSC seems to have merely a right to intervene to forestall action by the Prosecutor. A reading of Article 16 which provides that the UNSC has only a right rather than an obligation to intervene would be consistent with the status of the ICC as a non-UN body, as well as with the fact that neither the UN per se nor the UNSC are parties to the Rome Statute.[45] Moreover, applying basic common law principles of privity, it would seem anomalous for the Rome Statute to be understood as conferring a prerogative, let alone an obligation or duty, on the UNSC, as there appears to be no basis for holding that the UNSC has, or would have, accepted such a role.

As indicated above, the authors of the HRW Paper, referring to the work of other authors, assert that it was understood by the diplomatic conference that drew up the Rome Statute that the UNSC should make political decisions rather than the Prosecutor.[46] However, such a view would seem rather short-sighted, as well as impractical. Under the terms of the UN Charter, and Chapter VII in particular, the UNSC does not appear to be under an absolute duty to guarantee peace and security in each and every instance. Rather, the operative article of the Charter (Article 39) can be read merely as conferring on the UNSC the prerogative (i.e. at the expense of the other organs of the UN) of determining when there is a threat to the peace, and of what the appropriate steps to take might be in such circumstances.[47] Moreover, the history of the organization shows that the UNSC

43. Nabil Elaraby, *The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY, *supra* note 8, at 43 ("The abuse of the veto has, for many years, frustrated all hopes to consider the Council as a custodian for the application of the rule of laws.").

44. *See* Rome Statute, *supra* note 2, at art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

45. This point is made, of course, solely on the basis that in the ultimate analysis the ICC is not a UN body, notwithstanding e.g., the conclusion in 2004 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations. Nothing in this agreement, it should be noted, appears to affect the conclusions arrived at in this paper, nor the assumption as to the legal status of the ICC and UN as bodies independent of one another on which the current argument is partly predicated. *See* Negotiated Relationship Agreement, ICC-UN, April 10, 2004, ICC-ASP/3/Res.1, http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf.

46. *See* Turone, *supra* note 28, at 1143; Human Rights Watch, *supra* note 2, at 8.

47. U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security.").

has not always acted in a fashion that would evince an understanding of a duty to guarantee international peace and security.[48] Rather, in keeping with its political nature, the UNSC has taken such action as is politically expedient in any given situation, given the interests and considerations of its veto-wielding members. In short, allocating to the UNSC any duty to intervene under the Rome Statute would make the decision as to whether or not the Prosecutor should investigate or prosecute subject to the vagaries of international politics. While this may preserve the legitimacy of the Prosecutor's office, it seems a poor way of ensuring optimal outcomes if it is conceded that it may, on occasion, be preferable not to investigate or prosecute in deference to national transitional justice or peace initiatives.

The legal high ground assumed by the authors of the HRW Paper is also undermined by a willingness to defer to the judgment of the UNSC.[49] If the authors are correct in their assertion that there is a duty incumbent on states to ensure that certain crimes under international law are prosecuted, then they appear to be advocating two inconsistent positions. Specifically, it is difficult to see how the authors of the HRW Paper can take the view that while it is unacceptable for individual states to forego prosecutions it is somehow acceptable for the UNSC to allow states to behave in this fashion. While such inconsistency may be defensible on policy grounds, it seems difficult to see how the two positions can be reconciled from a principled perspective.[50]

Last, with regard to the legal extent of the UNSC's potential responsibility, it should be noted that the UNSC's role under Chapter VII of the UN Charter extends formally only to breaches and threats to international peace and security.[51] On this reading, the UNSC's responsibility could not extend to situations which do not constitute threats to international peace and security, notwithstanding that the ICC's jurisdiction includes criminal acts committed in situations (i.e., domestically) which may not threaten or breach international peace and security.[52]

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48. *See, e.g.,* Uniting for Peace Resolution, G.A. Res. 377(V), ¶ 1, U.N. GAOR, 5th Sess., 302 plen. mtg., (Nov. 3 1950).

49. *See* Human Rights Watch, *supra* note 20, at 7-9.

50. Consistent with their view that there is an absolute duty under international law to prosecute serious international crimes, the authors of the HRW Paper caution that "the Security Council's twelve month deferrals under Article 16 should not be renewed over and over... as that would result in de facto immunity." Human Rights Watch, *supra* note 20, at 8, n.31. Given the UNSC's behavior to date; however, including the granting of effective immunity from ICC prosecution to UN peacekeeping troops, it is difficult to see how HRW can assert that the UNSC ought to be relied on not to forestall such actions absolutely. Moreover, if in any event prosecutions ought to go ahead, and the Prosecutor retains some discretion as to the timing of investigations / prosecutions, then this somewhat begs the question of why it is deemed necessary by HRW to defer to the UNSC in the first place.

51. *See* U.N. Charter art. 24, para. 1 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security.").

52. This does not, of course, mean that a primarily domestic issue cannot have ramifications for international peace and security that would justify UNSC action under Chapter VII (e.g. the genocide in Rwanda). It does mean, however, that there is no necessary connection between the two, and that an episode or set of events may fall under the ICC's jurisdiction as comprising potentially criminal acts, yet not be of concern to the UNSC under Chapter VII.

While the authors of the HRW Paper suggest that "[w]ar crimes of the scope addressed in Article 8 of the ICC Statute as well as crimes against humanity are often likely to affect international peace and security,"[53] there can be no guarantee that this will always be the case. As such, it is difficult to see how the authors of the HRW Paper can maintain that the UNSC should and ought to be able to forestall investigations and prosecutions in situations where international peace and security are not threatened.

An additional consideration is that if the authors of the HRW Paper are correct that there is a duty incumbent on all states, and on the ICC, to ensure that the perpetrators of serious international crimes are always prosecuted, this could place immense strain on the ICC itself. If exceptions to this obligation cannot be made under international law generally, then the Prosecutor would have to endeavor to prosecute, or to have prosecuted, all those who might be responsible for crimes committed in violation of the Rome Statute in situations where national courts have declined to act.[54] At the very least, such a position would greatly diminish the scope for selective prosecution by the Prosecutor. Moreover, were such a position adopted by the court, the legitimacy of the institution may be diminished by its being obliged to strive towards unrealistic goals.

Some final points should be made as to the empirical evidence proffered in support of the HRW Paper's contentions. While the authors of the paper may be correct in maintaining that "justice itself can have tremendous value in contributing to peace and stability,"[55] there is nothing preordained about the relationships between justice, peace and stability.

Empirical evidence is cited by the authors of the HRW Paper in an attempt to square the circle formed by the demands of *realpolitik*[56] - the practice of which has been the best means of ensuring peace and prosecutions - which might be considered necessary for just outcomes to be achieved. Those who aver that justice can serve the ends of peace often cite to the indictment of Radovan Karadzic and Ratko Mladic prior to the Dayton Accord negotiations, for example, or evidence of the stigmatizing and marginalizing effect of prosecutions.

The authors of the HRW Paper may be correct in holding that ICC indictments can have a positive impact on the prospects for peace and security. Such an impact is far from guaranteed, however. ICC investigations and/or prosecutions could equally have a deleterious effect on situations where warring

53. Human Rights Watch, *supra* note 20, at 8 (emphasis added).

54. It might be worth noting at this juncture that, as recognized in the South African context "it is also not true that the granting of amnesty encourages impunity in the sense that perpetrators can escape completely the consequences of their actions, because amnesty is granted only to those who plead guilty, who accept responsibility for what they have done." If this is the case, and amnesties do not necessarily imply impunity, then the extent to which the Rome Statute itself also requires prosecution may well be questioned. DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 51 (1999).

55. Human Rights Watch, *supra* note 20, at 15.

56. That is, an approach to international relations whereby it is preferred that state behavior be based on practical exigencies and on prudential reasoning rather than on any moral or other ideological principles. *See, e.g.*, NICCOLO MACHIAVELLI, THE PRINCE 98 (Marriot ed. 1960) (1513).

factions are engaged in fragile peace negotiations or where a country is undergoing a democratic transition.[57] As Darryl Robinson concedes, it may even be necessary to forego prosecutions in order to forestall the perpetration of increasingly severe human rights abuses.[58] In short, while the authors of the HRW Paper may be lauded for their desire to ensure that the Prosecutor is not manipulated by combatants eager to avoid being indicted, if the net result of such manipulation is the gaining of a stable peace or a bloodless democratic transition, this price may be worth paying.

CONCLUSION

The single most attractive aspect of the HRW Paper is the authors' evident concern with maximizing the legal legitimacy of the Prosecutor and of the OTP, and thereby of the ICC. Moreover, the arguments put forward in the HRW Paper derive support from an apparently conservative approach to interpreting the relevant law, as well as from a relatively high degree of internal consistency. That said, though, the solution presented in the HRW Paper seems to fail on grounds of both legal interpretation and practicality. Put simply, while the UNSC may have the right to intervene in order to prevent an investigation or prosecution, this does not mean it will be obliged to do so. Thus, it would seem unwise to entrust to the UNSC decisions as to whether or not to act in any given case. Further, while the end of impunity may be a laudable goal, common sense suggests that it would be injudicious to advocate a way forward which would result in the removal of a great deal of the Prosecutor's discretion in deciding which cases to pursue. Moreover, forcing the ICC to aspire to undertake a caseload it would be ill-equipped to handle could jeopardize, rather than enhance, the court's legitimacy.

Doubtless, in many instances it will indeed be difficult for the Prosecutor to decide whether or not it will be in the interests of justice to investigate or prosecute. This does not lead to the conclusion, however, that such a determination can only be made at the cost of sacrificing institutional legitimacy. While it may not be possible for the Prosecutor to determine the intentions and *bona fides* of those involved in peace negotiations with an optimal degree of accuracy, this does not mean that the Prosecutor should be prevented from making such determinations altogether, nor that the Prosecutor should not be required to consider carefully the potential implications of his or her decisions. Some of the difficulties involved may also be mitigated by the adoption of a rigorous set of *ex ante* standards and regulations,[59] such as are in any event under consideration by the OTP. Indeed, while it may well be a challenging task, there is no reason why it should not be possible to construct a set of guidelines which would preserve the discretion of the Prosecutor, as well as ensure the legitimacy and credibility of the

57. The Northern Irish context, in which prisoners were released early under the Good Friday Agreement, comes to mind as an example of an occasion when strict understandings of legally 'correct' process took second place to the practical requirements of peace-making.

58. *See* Robinson, *supra* note 6.

59. *See* Danner, *supra* note 40, at 535-36.

OTP and of the ICC.[60] In any event, it seems clear that, for legal and policy reasons, discretion as to whether or not to proceed with investigations or prosecutions should be retained, in one way or another, within the ICC.

60. The possibility that such guidelines may later be publicly challenged might also encourage the Prosecutor to exercise discretion cautiously.

THE RIGHT OF VISIT AND THE 2005 PROTOCOL ON THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

NATALIE KLEIN*

I. INTRODUCTION

On October 14, 2005, a second Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 Convention)[1] was adopted at the International Maritime Organization (IMO).[2] The 1988 Convention had been developed as a response to the hijacking of the Italian vessel, the *Achille Lauro*, in Egyptian waters, and the murder onboard of a United States national. Austria, Egypt and Italy proposed the adoption of a treaty under the auspices of the IMO to set forth "comprehensive requirements for the suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives; jeopardise the safety of persons and property; seriously affect the operation of maritime services and, thus, are of grave concern to the international community as a whole."[3] The importance of this treaty at the time of its adoption was that it identified certain unlawful acts against ships and provided bases by which states could establish jurisdiction over the perpetrators of those unlawful acts.[4] What was missing from the 1988 Convention was effectively a means to apprehend offenders. The inclusion of a procedure in the 2005 Protocol to allow states to board ships marks a shift from merely

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1. Int'l Maritime Org. [IMO], Convention from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter 1988 Convention].

2. IMO, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21, Nov. 1, 2005, *available at* http://www.state.gov/t/isn/trty/81727.htm [hereinafter 2005 Protocol]. The first protocol was issued when the convention itself came out. IMO, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, IMO Doc. SUA/CON/16/Rev.1, *reprinted in* 27 I.L.M. 685 [hereinafter Fixed Platforms Protocol]).

3. Capt. Hartmut G. Hesse, *Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security*, 18 INT'L J. MARINE & COASTAL L. 327, 328 (2003).

4. As Halberstam notes, "its operative provisions deal not so much with the suppression of such acts, as with the apprehension, conviction and punishment of those who commit them." Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 292 (1988).

providing lawful bases to establish jurisdiction to creating the means to exercise jurisdiction.[5]

Following the terrorist attacks on the United States on September 11, 2001, the potential for comparable attacks in the maritime industry was increasingly appreciated. The Assembly of the IMO decided in Resolution 924 to review existing legal and technical measures to prevent and suppress terrorist acts against ships both at port and at sea, as well as improve security aboard and ashore.[6] The Secretary-General of the IMO stated that the adoption of the 2005 Protocol "mark[ed] the completion of the tasks set by the IMO Assembly in resolution A.924(22)."[7]

The initial focus on revisions to the 1988 Convention concerned the expansion of offenses under Article 3 over which states parties could establish jurisdiction, rather than the inclusion of ship-boarding provisions to enforce jurisdiction.[8] This suggestion emerged in August 2002 following discussions among a Correspondence Group established by the United States.[9] As the 1988 Convention needed updating to reflect developments from subsequent counter-

5. "Article 6 of the SUA Convention deals with States Parties' rights and obligations to establish jurisdiction, whereas this provision [in the 2005 Protocol] concerns the right to exercise jurisdiction." IMO, IMO Legal Comm., *Report of the Legal Committee on the Work of its Eighty-Ninth Session*, para 59, IMO Doc. LEG 89/16 (Nov. 4, 2004).

6. *See* Hesse, *supra* note 3, at 329. One of the key developments in addressing ship and port security was the adoption of the International Ship and Port Facility Security Code (ISPS Code). This Code was developed as an amendment to the 1974 Safety of Life at Sea Convention and came into force on July 1, 2004. The ISPS Code is enshrined in Regulation XI-2/3 of the 1974 Safety of Life at Sea Convention. Final Act of the International Convention for the Safety of Life at Sea, Regulation XI-2/3, Nov. 1, 1974, 32 U.S.T. 47, 14 I.L.M. 959 [hereinafter SOLAS]. Part A of the Code sets out mandatory security-related requirements for governments, port authorities and shipping companies. Part B then comprises of a series of non-mandatory guidelines as to how these requirements might be met.

7. Press Release, IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference (Oct. 17, 2005), *available at* http://www.imo.org/Newsroom/mainframe.asp?topic_id=1018&doc_id=5334.

8. Neither the Note by the Secretariat nor the initial US proposal referred to boarding provisions, but instead focused on the scope of offenses and the regulations on jurisdiction and extradition. *See* IMO, *Review of the Convention for the Suppression of Unlawful Acts Against the safety of Maritime Navigation, 1988 and its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf (SUA Convention and Protocol): Note by the Secretariat*, IMO Legal Comm., 84th Sess., Agenda item 6, IMO Doc. LEG 84/6 (March 13, 2002) [hereinafter *Review of SUA Convention and Protocol*]; IMO, *Review of SUA Convention and Protocol: Proposed modifications to update the SUA Convention*, IMO Legal Comm., Agenda item 6, IMO Doc. LEG 84/6/1 (Mar. 22, 2002) *submitted by the United States*; *Review of SUA Convention and Protocol: Proposed amendments*, IMO Legal Comm., Submission by Turkey, 84th Sess., Agenda item 6, IMO Doc. LEG 84/6/2 (Mar. 22, 2002); *see also* IMO, *Report of the Legal Committee on the Work of its Eighty-Fourth Session*, IMO Legal Comm., 84th Sess., Agenda item 14, IMO Doc. LEG 84/14 (May 7, 2002), Annex 2, "Terms of Reference of the Correspondence Group Regarding the 1988 SUA Convention and the 1988 SUA Protocol."

9. *See* IMO Legal Comm., 85th Sess., Agenda Item 4, *Review of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf (SUA Convention and Protocol): Draft Amendments to the SUA Convention and SUA Protocol*, IMO Doc. LEG 85/4 (Aug. 17, 2002).

terrorism treaties,[10] the United States similarly proposed that the amendments should take into account ship-boarding provisions that had developed through the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[11] the Protocol against the Smuggling of Migrants by Land, Sea and Air,[12] as well as agreements relating to cooperation in suppressing illicit maritime trafficking in narcotic drugs and psychotropic substances in the Caribbean.[13] In drawing on these treaties, the amendments to the 1988 Convention thus expanded not only to reflect developments in relation to the suppression of international terrorism, but also to create a new legal basis by which states will be able to exercise the right of visit on the high seas. The United States, a key participant in negotiations, considers that the 2005 Protocol "establish[es] the most well-developed boarding procedures and safeguards in any instrument of its type."[14]

This Article focuses on the ship-boarding aspect of the new agreement, as the 2005 Protocol represents the latest exception to the traditional rules relating to the exclusive jurisdiction of the flag state over its vessels when those vessels are on the high seas. This innovation is important when considered in light of the United States' recent efforts under the Proliferation Security Initiative (PSI) to establish a regime intended to prevent the movement of weapons of mass destruction, their delivery systems and related materials between states and non-state actors of

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10. *See e.g.,* International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164, U.N. GAOR, 52nd Sess., U.N. Doc. A/Res/52/164 (Jan. 9, 1998), *reprinted in* 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, U.N. GAOR, 54th Sess., U.N. Doc. A/Res/54/109 (Dec. 9, 1999), *reprinted in* 39 I.L.M. 270 (2000); International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res. 766, U.N. GAOR, 59th Sess., U.N. Doc. A/Res/59/766 (Apr. 4 2005), *reprinted in* 44 I.L.M. 815 (2005).

11. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. ESCOR, U.N. Doc. E/Conf.82/15 (Dec. 20, 1988), *reprinted in* 28 I.L.M. 497 (1989).

12. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 383, 55th Sess., U.N. Doc. A/RES/55/383 (Nov. 15, 2000), *reprinted in* 40 I.L.M. 335, 384 (2001).

13. *See* Agreement Between the United States of America and the Republic of Haiti Concerning Cooperation to Suppress Illicit Maritime Drug Traffic, U.S.-Haiti, Oct. 17, 1997, 1997 U.S.T. Lexis 128; Agreement Between the Government of the United States of America and the Government of the Republic of Honduras Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, U.S.-Hond., Mar. 29, 2000, 2000 U.S.T. Lexis 159; Agreement Between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, U.S.-Nicar., June 1, 2001, 2001 U.S.T. Lexis 63; Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala Concerning Cooperation tot Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea and Air, U.S.-Guat., June 19, 2003, *available at* http://guatemala.usembassy.gov/uploads/images/COB7Udl1HS7y04mWhEcLNg/usguatmaritimeagreemente.pdf.

14. International Conference on the Revision of the SUA Treaties, Submission by the United States, *Consideration of a Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and a Draft Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988,* ¶ 3, IMO Doc. LEG/CONF.15/14 (Sept. 22, 2005), *available at* http://www.state.gov/t/isn/trty/58319.htm [hereinafter Consideration of a Draft Protocol to SUA].

proliferation concern. There have been considerable doubts about the legality of various aspects of the PSI,[15] and the participants in the regime have recognized that their current authority is limited to maritime areas and vessels under their jurisdiction.[16] The United States now views the 2005 Protocol as:

> establish[ing] an international legal basis to impede and prosecute the trafficking of [weapons of mass destruction], their delivery systems and related materials on the high seas, helping implement our common obligations under UN Security Council resolution 1540 and closing loopholes that proliferators or terrorists might use to transfer [weapons of mass destruction], their delivery systems and related materials.[17]

The 2005 Protocol, as a new development in the law of the sea, is intended to enhance maritime security and counter-terrorism efforts, but must still be considered as part of a broader body of law regulating rights and duties in different maritime areas. The history of the law of the sea has been entrenched in the principle of *mare liberum*, the freedom of the seas. As described by McDougal and Bourke in 1962:

> By appropriate accommodation and compromise, a public order of the seas has been maintained to permit states to send their argosies to all the four corners of the world and to take adequate account of both the general security interest of the community of the states and the special security interest of particular states.[18]

The law of the sea has traditionally encapsulated an appropriate balance between inclusive claims (accommodating all states) and exclusive claims (those benefiting single states) in order to achieve a common interest.[19] Although the predominant emphasis in the law of the sea has been that the common interest is achieved through maintaining the freedoms of the high seas and respecting flag state authority in these areas, these central motivations may no longer be completely appropriate given the recent claims to undertake various measures for

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15. *See, e.g.*, Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, 256-69 (2005); Stuart Kaye, *The Proliferation Security Initiative in the Maritime Domain*, 35 Isr. Y.B. Hum. Rts. 205, 224-29 (2005).

16. *See generally Fact Sheet, Proliferation Security Initiative: Statement of Interdiction Principles*, U.S. Dept. of State (Sept. 4, 2003), http://www.state.gov/t/isn/rls/fs/23764.htm [hereinafter Statement of Interdiction Principles].

17. Consideration of a Draft Protocol to SUA, *supra* note 14, ¶ 3.

18. MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 54 (Yale University Press) (1962).

19. "[T]he common interest is in an accommodation of exclusive and inclusive claims which will produce the largest total output of community values at the least cost." MCDOUGAL & BURKE, *supra* note 18, at 52. Drawing on McDougal and Burke's analysis, this Article refers to inclusive interests as those that are shared by the international community; inclusivity promotes the idea that the law of the sea should be constructed and understood in a way that supports common use of an area so that a mutual benefit is shared by the vast majority. Exclusive interests are held by one particular state and are asserted against the rights and responsibilities of all other states; exclusivity is premised on the notion that one state should have the authority to reach decisions over ocean space and use without necessarily accounting for the interests of others (beyond a due regard requirement).

the enhancement of maritime security. This Article therefore examines the 2005 Protocol against this history and argues that a paradigm shift may be needed in order fully to meet modern interests in maritime security. The common interest in ensuring maritime security may mean that a readjustment in the balance of exclusive and inclusive interests has become necessary.

The second Part of this Article describes in greater detail the traditional paradigm in which the law of the sea operates, namely, the foundational concept of *mare liberum* and the concomitant authority accorded to states over their vessels on the high seas. Having established this basis, the Article turns in Part Three to certain limited exceptions to the traditional paradigm whereby the right of visit has been recognized at different times for the advance of particular social interests, and highlights the way that adherence to the freedom of the high seas and flag state control have moderated the contours of these exceptions. These categories of exceptions have not been closed, however, and Part Four addresses the possibility of allowing for further encroachments on the freedom of the seas through treaty. In view of these limited instances where the right of visit may be exercised, the discussion in Part Five then turns to the interaction of security interests vis-à-vis the right of visit and how current concerns about security are putting pressure on the traditional rules relating to the use of force and motivating states to develop a variety of means to meet their key interests in enhancing maritime security. Part Six explores the right of visit under the 2005 Protocol against the background of the traditional paradigm and previous efforts to improve maritime security. When the ambiguities and gaps in the 2005 Protocol are exposed, it raises the important question of whether there is a need for a paradigm shift so as better to accommodate exclusive and inclusive interests in achieving the common goal of ensuring the safety and security of international shipping.

II. THE TRADITIONAL PARADIGM: FLAG STATE JURISDICTION AND THE FREEDOM OF THE HIGH SEAS

For almost four hundred years, the foundational concept for the law of the sea has been the principle of *mare liberum*, the freedom of the high seas. The wide expanses of the oceans have traditionally been regarded as areas that no state could control and hence over which no state could claim dominion or sovereignty.[20] Any developments in the law of the sea have been premised on the idea that the oceans, barring a narrow strip of water subject to coastal state sovereignty,[21] are open to all users and that any claims to ocean space or use were to be viewed as encroachments on these freedoms of the high seas.[22] The emphasis has thus been

20. Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. INT'L L. & POL. 703, 707-08 (2001).

21. United Nations Convention on the Law of the Sea, art. 2(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.").

22. *See* R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 161 (3rd ed. 1999) (describing the compromise proposal of the exclusive economic zone (EEZ) to prevent the institution of the 200-mile territorial sea); *id.*, at 144 (discussing the debated status of the continental shelf); *id.*, at 77-79 (setting

on retaining inclusive enjoyment of this ocean space, and only permitting exclusive claims to prevail if they "serve the common interest where the impacts of use are especially critical for a particular state and the restrictions upon inclusive use are kept to the minimum."[23]

Instead of claims of rights or control over this ocean space, a state has authority over the vessels that ply these areas under the flag of that state. Garvey has proclaimed that "[f]lag state jurisdiction [is]...a highly significant embodiment of the general principle of freedom of the seas."[24] It is the very fact that the high seas are open to all states that no one state is then able to exert control or authority over the vessels traversing the oceans unless that vessel has a tie to that particular state. As observed in the 1817 judgment of *Le Louis*:

> In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another... [N]o nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim.[25]

This Part examines in more detail the traditional paradigm of the high seas freedoms and flag state control.

A. The Freedom of the High Seas

Writing in 1608, Hugo Grotius argued that the very nature of the oceans demanded that they be available to all users.[26] Unlike land territory, which can be occupied, guarded and secured against invasion, the physical characteristics of the oceans mean that the high seas do not comparably permit the same level of control.[27] Grotius equally appreciated the economic importance of the high seas constituting a *res communis*, as the ability of ships to transport people and goods around the globe without passage becoming subject to a state's control would facilitate international trade.[28] This economic interest was also manifested in the desire to maintain fishing grounds in as wide an area as possible.[29] The shared interest in this freedom of navigation would allow not only the movement of goods

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out the controversy relating to the breadth of the territorial sea).

23. MCDOUGAL & BURKE, *supra* note 18, at 749.

24. Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. CONFLICT & SECURITY L. 125, 132 (2005).

25. Le Louis, (1817) 165 Eng. Rep. 1464, 1479.

26. HUGO GROTIUS, THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE 28 (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1633) ("[T]he sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.").

27. *See* Brilmayer & Klein, *supra* note 20, at 707-08.

28. Grotius was particularly arguing the case of the Dutch East Indies Company at the time (as the very title of the work suggests), against Portuguese claims of sovereignty over the Indian Ocean. *See* GROTIUS, *supra* note 26, at 38, 42.

29. *See* GROTIUS, *supra* note 26, at 32.

and people, but also permit unhindered passage of naval fleets of the maritime powers to areas of political and military influence.[30] At a time when shipping provided the only means for states to communicate with overseas colonies and dominions, the importance of securing the means for this assertion of authority was evident.

Even with considerable technological advances, the common interest that prevailed was to permit the ongoing characterization of ocean areas as *mare liberum* and thus maintain the freedoms of the seas. During one of the first major efforts to codify the law of the sea at the 1958 Conference on the Law of the Sea, the Soviet Union affirmed the continuing relevance of the traditional paradigm:

> [T]he principle of the freedom of the high seas had been for centuries reaffirmed in the effort to combat attempts by states to secure mastery over large maritime areas. The freedom of the high seas meant that they were open to all states on an equal footing, and that no state could claim sovereignty over them to the detriment of others; it was satisfactory to note that in modern times that principle had acquired a new and practical meaning for the peoples of countries which had recently won their independence.[31]

Whenever states have sought to extend their sovereignty or jurisdiction over greater reaches of maritime space, other states have resisted this threat to *mare liberum* in accordance with their preference for maintaining the high seas freedoms. Any new claims of exclusivity over ocean space or resources have most commonly been viewed as a derogation from the pre-existing freedoms of the high seas and so have been curtailed in accordance with these freedoms.[32] For example, when states negotiated the status of the Exclusive Economic Zone (EEZ), it was argued that the freedoms of the high seas within this 200-mile zone were to be qualitatively and quantitatively the same as the high seas freedoms outside the zone.[33] The high seas freedoms coexist with the exclusive rights of the coastal state in this maritime zone, provided that they are not incompatible with the legal regime of the EEZ.[34]

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30. *See* Sam J. Tangredi, *Globalization and Sea Power: Overview and Context*, *in* GLOBALIZATION AND MARITIME POWER 1, 7 (Sam J. Tangredi ed., 2002), *available at* http://www.ndu.edu/inss/books/Books_2002/Globalization_and_Maritime_Power_Dec_02/02_ch01.htm.

31. U.N. Conference on the Law of the Sea, Feb. 24-Apr. 27, 1958, *Official Records Vol. IV: Second Committee,* at 9, U.N. Doc A/CONF.13/40 (comments of U.S.S.R.).

32. For example, as noted above, claims to rights over the continental shelf, to increased breadths of territorial seas and to the living resources in areas adjacent to the coast have always been countered by the rights of other users to the high seas. *See* CHURCHILL & LOWE, *supra* note 22, at 59, 119, 280.

33. Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, FOREIGN AFF., Spring 1979, at 916. ("[T]hey must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete – and allow for future uses no less inclusive – than traditional high-seas freedoms").

34. *See* UNCLOS, *supra* note 21, art. 58(2). In addition, the rights and duties located in Articles 88 to 115 are deemed to apply to the EEZ provided they are not incompatible with Part V. Articles 88

As currently formulated, the freedoms of the high seas have included not only the freedoms of navigation and fishing, but also freedoms of laying submarine cables and pipelines, and overflight.[35] There has not been an exhaustive categorization of the high seas freedoms,[36] and scientific research and a variety of military activities are typically regarded as other freedoms of the high seas.[37] States have generally accepted that the freedoms of the high seas entailed certain responsibilities or implied restrictions.[38] "The purpose of such regulation was to safeguard the exercise of the freedom in the interests of the whole international community."[39] The International Law Commission set forth this view in its commentary to the draft articles for the 1958 High Seas Convention:

> Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community.[40]

It is evident here that the common interest has been to favor inclusive interests through the maintenance of the high seas freedoms.

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through 115, which are located in Part VII of the Convention dealing with the high seas, address not only navigation and the laying of submarine cables but also include the nationality and status of ships, piracy, slavery, drug trafficking, and unauthorized broadcasting.

35. UNCLOS, *supra* note 21, art. 87(1); Convention on the High Seas art. 2, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 10, [hereinafter High Seas Convention]. UNCLOS also refers to the freedoms to construct artificial islands and other installations and of scientific research. UNCLOS, *supra* note 21, art. 87(1).

36. The preferred legal formulation has been to set out an inclusive list of high seas freedoms (signaled by the phrase "*inter alia*"). *See* UNCLOS, *supra* note 21, art. 87; *see also* High Seas Convention, *supra* note 35, art. 2.

37. Such a view of marine scientific research was taken during the formulation of the High Seas Convention at the 1958 Conference. Only an implicit reference to scientific research was included in Article 2 of that treaty, which is not an exclusive list of high seas freedoms but allows for other general principles of international law to be incorporated amongst the assorted freedoms of the high seas. The International Law Commission intended such an inclusive approach and noted that the freedom to conduct scientific research would be another freedom. *See Report of the International Law Commission to the General Assembly,* 19 U.N. GAOR Supp. (No. 9) art. 27 cmt. 2, U.N. Doc A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 278, A/CN.4/SER.A/1956/Add.1. UNCLOS now explicitly refers to the freedom of scientific research. UNCLOS, *supra* note 21, art. 87(1)(f). Moreover, military activities have usually been included among the traditional freedoms of the high seas, even if not explicitly stated. Instead, the freedom of navigation has usually been viewed as encompassing the free movement of warships across the high seas. *See* D. P. O'CONNELL, VOL. 2 THE INTERNATIONAL LAW OF THE SEA 809 (I. A. Shearer ed., 1984); P. Sreenivasa Rao, *Legal Regulation of Maritime Military Uses*, 13 INDIAN J. INT'L L. 425, 435 (1973).

38. *See, e.g.*, U.N. Conference on the Law of the Sea, *supra* note 31, at 24 (comments of Czechoslovakia); *see also* Scott C. Truver, *The Law of the Sea and the Military Use of the Oceans in 2010*, 45 LA. L. REV. 1221, 1237 (1985) (commenting that the freedoms of the high seas are by no means absolute, but have been constrained and qualified in the mode and place of their exercise).

39. U.N. Conference on the Law of the Sea, *supra* note 31, at 15 (comments of U.S.).

40. *Report of the International Law Commission to the General Assembly, supra* note 37, art. 27 cmt. 5.

The consequence of *mare liberum* has been the generation of a tension between inclusivity and exclusivity in claims to ocean space and its use. As a general matter, it is adherence to *mare liberum* that has ensured an ongoing viability for the recognition of inclusive interests in the ways that ocean space and use are regulated. As a further broad proposition, exclusive interests have only been accepted to the extent that they do not threaten this ongoing observance of *mare liberum*. These exclusive interests are manifested in the importance attributed to flag state control over vessels on the high seas, which is discussed immediately below, and in the limited exceptions to this authority, as seen in the narrow instances allowing for the right of visit, which are addressed in Part Three.

B. Flag State Jurisdiction on the High Seas

Against this background, it seems an inevitable consequence that a state may only exercise authority over those vessels bearing its flag because to do otherwise would be tantamount to an assertion of jurisdiction or sovereignty over the high seas, which is prohibited under international law.[41] The freedom of navigation provides vessels of any state with the right to traverse the high seas with minimal interference from any other state.[42] The Permanent Court recognized as much in the *SS Lotus* case: "It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly."[43]

A ship is to sail under the flag of one state.[44] States set the conditions for the grant of nationality to ships and for the right to fly their flag.[45] In bestowing the right to fly its flag, there must be a genuine link between the state and the ship.[46] The importance of flag state control over a vessel is underlined by the requirement that the registration of a ship with a particular state may only be changed when the vessel is in port, thereby ensuring that the nationality of the vessel remains constant while the vessel is at sea.[47]

A vessel is then subject to the exclusive jurisdiction of the state to which it is flagged, with any exception limited to those expressly provided for by treaty.[48]

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41. UNCLOS, *supra* note 21, art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty.").

42. Interference is limited to the rights of visit and hot pursuit. The right of hot pursuit is addressed below. *See infra* note 56 and accompanying text.

43. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 7).

44. UNCLOS, *supra* note 21, art. 92(1).

45. *Id.*, art. 91(1).

46. *Id.* This rule has been disregarded to some extent given the prolific use of so-called "flags of convenience" whereby ship owners seek the right to fly the flag of a state that does not necessarily enforce either international standards as to the seaworthiness of the vessel, or fishing or environmental requirements as stringently as another state, and that is not as expensive as another state. It is perhaps the mutual commercial interest that purports to provide the "genuine link" in such cases.

47. *Id.*, art. 92(1); Kaye, *supra* note 15, at 210.

48. UNCLOS, *supra* note 21, art. 91(1). *See infra* Parts III and IV. Joyner emphatically denies that there is any existing right under customary international law to permit the interdiction of foreign flagged vessels on the high seas. Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 536-37

Exclusivity of jurisdiction extends to the exercise of both prescriptive and enforcement jurisdiction. "Under the *mare liberum* principle, the interdiction of a flag vessel of a foreign state is generally considered to be the prerogative of the flag state in question, not of third-party states patrolling the high seas."[49]

While this right of flag state control over vessels on the high seas is recognized as generally applicable to all types of ships, warships and ships owned or operated by a state and used only on government non-commercial service are afforded additional protection against the application of any possible exception. The latter vessels are entitled to complete immunity from the jurisdiction of any state besides the flag state when on the high seas.[50] As a result, third-state rights against foreign warships on the high seas are virtually non-existent. Instead, an attempt to exercise law enforcement jurisdiction against a foreign warship could be tantamount to a threat or use of force against a sovereign instrumentality of a foreign state.[51]

The reasons behind this entrenched rule of control over flagged vessels and non-interference with those vessels on the high seas were clearly stated in *Le Louis*.[52] In *Le Louis*, the High Court of Admiralty referred to the "perfect equality and entire independence of all distinct states" and their "equal right to the uninterrupted use of the un-appropriated parts of the ocean for their navigation".[53] A vessel that flies the flag of a particular state is then assimilated to the territory of that state; "what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies."[54] Today, exclusive flag state jurisdiction remains "of critical importance to securing the interests of the global economy and the world's major navies, and epitomizes international law where adherence is firm and universal in its political basis."[55] The common interest in the law of the sea has thus traditionally been a balance of inclusive interests in the freedoms of the high seas and exclusive interests held by flag states in exercising control over their vessels as they navigate the Earth's waters.

III. LIMITED EXCEPTIONS: CERTAIN SOCIAL CAUSES PREVAIL

The adherence to the traditional paradigm of freedom of the high seas and exclusive flag state control means that the right of any state to exercise jurisdiction over a vessel not flagged to it will only be permissible where there has been express agreement between the states in question. One of the key exceptions in this regard is the right of visit,[56] which is codified in Article 110 of the UN

(2005).

49. Thomas D. Lehrman, Note, *Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture*, 45 VA. J. INT'L L. 223, 229 (2004).

50. UNCLOS, *supra* note 21, art. 95-6.

51. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 815 (1984).

52. Le Louis, *supra* note 25, at 1475.

53. *Id.*

54. S.S. Lotus, *supra* note 43, at 25.

55. Garvey, *supra* note 24, at 132.

56. The other key exception is the long-established right of hot pursuit. *See* D. P. O'CONNELL,

Convention on the Law of the Sea (UNCLOS).[57] The right of visit granted under UNCLOS is expressly for the enforcement of the designated prescriptions included in that treaty with respect to vessels that are not accorded immunity.[58]

Article 110 of UNCLOS sets out four instances where warships may exercise a right of visit against a foreign-flagged vessel: piracy, slavery, unlawful broadcasting, and where suspicions as to the nationality of the vessel arise.[59] These exceptions to flag state authority and the freedom of the high seas have resulted from "globally-shared needs and troubles, especially in modern times."[60]

Even within these exceptions, there are limitations that apply in relation to the specific acts, as well as in relation to the exercise of the right of visit generally. As a general matter, the procedure to be followed under Article 110 is that a ship may be sent under the command of an officer to the suspected ship in order to check its documents.[61] If suspicion remains, the suspected ship may then be boarded for further examination.[62] This examination must be carried out "with all possible consideration."[63] In the event that the suspicions prove unfounded and that no act was committed that justified such suspicions, the ship visited is entitled to compensation "for any loss or damage that may have been sustained."[64] The specific grounds warranting this procedure, and the ongoing protections afforded to maintain the traditional paradigm, are discussed in this Part.

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supra note 37, at 1078-79 (describing the entrenched position of the right and consequent lack of controversy over the right during the progressive codification of the law of the sea); *see also* Robert C. Reuland, *The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention*, 33 VA. J. INT'L L. 557 (1993). The right of hot pursuit is premised on the idea that a coastal state may pursue a foreign vessel when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state (including violations of laws and regulations of the EEZ and the continental shelf). UNCLOS, *supra* note 21, art. 111(1-2). Hot pursuit must be commenced when the foreign vessel is within the internal waters, archipelagic waters, territorial sea or contiguous zone of the pursuing state, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted . UNCLOS, *supra* note 21, art. 111(1). "The right of hot pursuit – an exception to the freedom of the high seas – is at the same time a right of the littoral State established for the effective protection of areas under its sovereignty or jurisdiction." NICHOLAS M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 39 (1969).

57. UNCLOS, *supra* note 21, art. 110.

58. *Id.*

59. *Id.*, art. 110(1). There are also limited instances where a state may prescribe and enforce certain measures against foreign vessels in the EEZ and on the high seas in order to protect and preserve the marine environment. *Id.*, art. 221. Or for the management and conservation of fisheries. *Id.*, art. 73; *see also* I. A. Shearer, *Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels*, 35 INT'L & COMP. L.Q. 320, 333-41 (1986).

60. H.E. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 373.

61. UNCLOS, *supra* note 21, art.110(2).

62. *Id.*

63. *Id.*

64. *Id.* art. 110(3).

A. Piracy

The menace of piracy towards maritime commerce has been documented since the days of ancient Greece and the Roman Empire.[65] An exception to flag state authority came to be recognized in respect of piracy because of the great importance to the European powers of securing their trade routes and transport lines to overseas colonies.[66] "The purpose of [the] laws against piracy is to suppress unlawful acts of violence on the high seas and to protect commerce '... in the interest of the freedom of the seas [; therefore,] international customary law authorises any subject of international law to extend its jurisdiction to such outlaws.'"[67]

Universal jurisdiction exists over pirates, who are viewed as *hostis humani generis*.[68] "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."[69] This universal jurisdiction has been recognized due to the threat to commerce posed by acts of piracy.[70] As the enemies of all humankind and thereby a threat to all states, no state could be held responsible for the acts of pirates and universal jurisdiction was considered appropriate.[71] However, at the point that the acts were not threatening "to all states or the act was done under the authority of a state, universal jurisdiction..." would no longer be available.[72]

Early definitions of piracy had sought to establish a broad basis for warranting the exercise of universal jurisdiction.[73] Oppenheim, for example, defined piracy as "every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel."[74] After surveying a range of commentators and codification efforts on piracy, Halberstam concluded that "[t]he customary law of piracy can be best understood as an attempt to balance the need for universal jurisdiction against the reluctance of states to permit encroachment on their exclusive jurisdiction."[75] Under UNCLOS, piracy consists of:

> any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private

65. Jesus, *supra* note 60, at 364.

66. CHURCHILL & LOWE, *supra* note 22, at 209.

67. Anna van Zwanenberg, *Interference with Ships on the High Seas*, 10 INT'L & COMP. L.Q. 785, 805 (1961).

68. Enemies of all humankind.

69. UNCLOS, *supra* note 21, art. 105.

70. *See* Tina Garmon, Comment, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 260 (2002).

71. Halberstam, *supra* note 4, at 288.

72. *Id.*

73. *Id.* at 273-76.

74. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 609 (H. Lauterpacht ed., David McKay Company Inc. 8th ed. 1955).

75. Halberstam, *supra* note 4, at 287-88.

> ship or a private aircraft, and directed... against another ship... , or against persons or property on board [that other ship on the high seas].[76]

Certain features of the UNCLOS definition have served to exclude some terrorist attacks from this ground to exercise the right of visit.[77] In particular, the requirement in the definition of piracy that two ships are involved precludes the characterization of hijacking (where passengers gain control of one ship) as piracy.[78] Also, that the act is for private ends or private gain has also narrowed the range of acts that may be classed as piracy.[79] For example, the hijacking of the *Santa Maria*, a Portuguese merchant vessel, in 1961 by passengers in the name of the Independent Junta of Liberation, which had been defeated in the Portuguese Presidential elections of 1958, was not considered to be for private ends.[80] While clearly inadequate to respond to acts of maritime terrorism, the narrow definition of piracy has provided an acceptable basis for states to exercise the right of visit against foreign vessels on the high seas.[81]

B. Slave Trade

Article 110 of UNCLOS recognizes that warships may visit and board a foreign vessel on the high seas when it is reasonably suspected that the foreign vessel "is engaged in the slave trade."[82] However, unlike foreign vessels and persons engaged in piracy, the visiting vessel does not have the right to seize the vessel or arrest and prosecute those on board. A distinction is drawn in this regard between the right to board and the right to seize the vessel and arrest the crew.[83] Both acts of enforcement jurisdiction are anticipated with respect to piracy, but not in relation to the slave trade. Instead, Article 99 of UNCLOS only requires states to suppress the slave trade in relation to their own vessels.[84] This regime reflects the 1817 decision of *Le Louis* where it was held that British warships had no right to visit and search vessels of other states for the purposes of suppressing the slave

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76. UNCLOS, *supra* note 21, art. 101(a)(i).

77. *See generally* Halberstam, *supra* note 4; Garmon, *supra* note 70.

78. CHURCHILL & LOWE, *supra* note 22, at 210.

79. *See* Garmon, *supra* note 70 at 265; Halberstam, *supra* note 4, at 282.

80. van Zwanenberg, *supra* note 67, at 803-17; Halberstam, *supra* note 4, at 286-87.

81. It was due to the narrow definition of piracy included in UNCLOS, and now accepted as customary international law, that the 1988 Convention was required. The acts of those responsible for the hijacking of the *Achille Lauro* and the murder of Mr. Klinghoffer could not be characterized as piracy. *See* Garmon, *supra* note 70, at 262; Halberstam, *supra* note 4, at 276. However, as discussed above, the 1988 Convention did not create a procedure for states to exercise jurisdiction over alleged offenders. *See supra* notes 4-5 and accompanying text.

82. UNCLOS, *supra* note 21, art. 110(1)(b).

83. As explained by Guilfoyle:

> An interdiction has two potential steps. The first stage is stopping, boarding and searching the vessel for evidence of the prohibited conduct... Where boarding reveals evidence of such conduct, the arrest of persons on board and/or seizure of the vessel or its cargo may follow... The boarding and seizure stages of interdiction involve different exercises of enforcement jurisdiction.

Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 J. CONFLICT & SEC. L. 1, 4 (2007).

84. UNCLOS, *supra* note 21, art. 99.

trade.[85] Even though prohibitions on the slave trade have long been entrenched in international law,[86] the enforcement of the prohibition, consistent with the traditional paradigm, is conferred solely on the flag state.

C. Unauthorized Broadcasting Activities

The right of visit has also been permitted in relation to the transmission of radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations.[87] The problem of unauthorized broadcasting grew at the end of the 1950s and into the 1960s, particularly in the Baltic, Irish and North Seas.[88] Coastal states were opposed to the operation of these radio stations due to interference with pre-existing stations, threats to commercial broadcasting interests, including the "broadcast [of] material (most of which consists of records of 'pop' music) without the appropriate royalty payments being made to copyright... holders," and tax avoidance.[89] Despite these concerns, there was resistance among the affected states at the time to utilize " 'strong-arm action' " that would run "counter to the traditional British concept of the freedom of the seas."[90] The affected states within the Council of Europe instead proceeded to adopt a treaty that established jurisdictional rules in connection with the establishment, operation and facilitation of unlawful offshore broadcasting stations,[91] rather than extending the reach of their criminal jurisdiction into the high seas.[92] This treaty then formed the basis of a proposal while negotiating UNCLOS, which resulted in the adoption of Article 109.[93]

Under Article 109 of UNCLOS, the vessels entitled to exercise the right of visit must have jurisdiction over the unauthorized broadcasting based on the offending vessel or installation being of the same flag or registry, the nationality of the offenders, or the vessel or installation is flagged to the state where the transmissions can be received or where authorized radio communication is suffering interference.[94] States are accorded both legislative and enforcement jurisdiction in this regard.[95] If a military vessel does not have jurisdiction on these

85. Le Louis, *supra* note 25, at 1464.

86. *See, e.g.*, Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

87. UNCLOS, *supra* note 21, art. 109.

88. *See* N. March Hunnings, *Pirate Broadcasting in European Waters*, 14 INT'L & COMP. L.Q. 410, 410 (1965) (referring to eleven such stations that had come into operation between 1958 and 1965).

89. *Id.* at 413.

90. J C Woodliffe, *The Demise of Unauthorised Broadcasting from Ships in International Waters?*, 1 INT'L J. ESTUARINE & COASTAL L. 402, 403 (1986) (citing to debates in the United Kingdom House of Commons and House of Lords, respectively).

91. European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories, *opened for signature* Jan. 20, 1965, Europ. T.S. No. 53.

92. Woodliffe, *supra* note 90, at 403.

93. *Id.* at 405-06.

94. UNCLOS, *supra* note 21, art. 109(3).

95. CHURCHILL & LOWE, *supra* note 22, at 212.

grounds, it may not conduct a boarding or seize the suspected vessel or installation, or arrest and prosecute those on board. The importance of the freedom of the high seas demanded that one of these acknowledged bases of jurisdiction exist in order to subject a foreign vessel to the right of visit.

D. Questions as to Nationality of the Vessel

When a "ship is, in reality, of the same nationality [of a] warship," even "though flying a foreign flag or refusing to show its flag," the warship is entitled to board the ship to verify its suspicions as to nationality.[96] This right to visit a vessel to verify its flag was initially justified as part of states' efforts to detect piracy.[97] It has recently offered a lawful basis for the boarding of a vessel, the M/V *So San,* that departed North Korea and was headed to Yemen. Concerns about the nationality of the M/V *So San* provided the justification for the Spanish Navy to board the Cambodian vessel wherein fifteen Scud missiles were discovered on board.[98] Although the boarding was lawful in this context, there was no prohibition on the delivery of the weapons to Yemen and the vessel was released in order to complete its journey.[99] Without the query as to nationality, the boarding would have been viewed as an illegal interference with high seas freedoms.

The right of visit of a stateless vessel had not been recognized under the 1958 High Seas Convention.[100] As a result, there was some debate as to whether the right of visit could be asserted against such a vessel. For example, a United States Court of Appeals reached the decision in *United States v. Marino-Garcia* that:

> international law permits any nation to subject stateless vessels on the high seas to its jurisdiction. Such jurisdiction neither violates the law of nations nor results in impermissible interference with another sovereign nation's affairs. We further conclude that there need not be proof of a nexus between the stateless vessel and the country seeking to effectuate jurisdiction. Jurisdiction exists solely as a consequence of the vessel's status as stateless.[101]

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96. UNCLOS, *supra* note 21, art. 110(1).

97. To this end, Oppenheim wrote:

> It is a universally recognized customary rule of International Law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag. But such vessels must be suspicious. Since a suspicious vessel may still be a pirate although she shows a flag, she may further be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag.

OPPENHEIM, *supra* note 74, at 604.

98. J. Ashley Roach, *Initiatives to Enhance Maritime Security at Sea*, 28 MARINE POL'Y 41, 53-54 (2004).

99. *See* Frederic L. Kirgis, *Boarding of North Korean Vessel on the High Seas*, ASIL INSIGHTS (American Society of International law, Wash. D.C.) Dec. 12, 2002, http://www.asil.org/insights/insigh94.htm.

100. Article 22 of the High Seas Convention only referred to vessels that were the same nationality of the warship but flying another flag or refusing to show its flag. High Seas Convention, *supra* note 35, art. 22.

101. United States v. Marino-Garcia, 679 F.2d 1373, 1383 (11th Cir. 1982), *cited in* William C.

On the other hand, Churchill and Lowe have argued that "there is a need for some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them."[102] They considered that such a nexus may be established based on the nationalities of the crew or other persons on board the vessel.[103] The question has now been resolved in favor of recognizing the right of visit under Article 110 of UNCLOS, although some question still remains as to whether a stateless vessel may be seized and those on board arrested.[104] Presumably the very status of the vessel as stateless posed no threat to exclusive flag state control in this situation. If the suspicions regarding the nationality of a vessel prove unfounded then, as mentioned above,[105] the vessel may be entitled to compensation for any damage sustained.[106]

E. Conclusion

The designated instances under Article 110 of UNCLOS warranting the right of visit by a warship on the high seas against a foreign-flagged vessel are few in number, and are not uniform in establishing prescriptive and/or enforcement jurisdiction over these vessels. Both for the right of visit in respect of unlawful broadcasting and of the slave trade, the warship must have an established basis of jurisdiction to justify the arrest of the vessel. The right of visit to check nationality or in relation to stateless vessels then reinforces the importance of flag states maintaining their control over their own vessels. It is only in relation to piracy that universal jurisdiction exists so that all warships have the right to visit, search and arrest a vessel not flying its own flag. The common interest has been that these particular social issues have warranted some incursions into absolute flag state authority; there is an inclusive interest in suppressing the slave trade, and arresting pirates and so exclusive claims to assert jurisdiction over non-flag vessels in these limited circumstances have been accepted. The fact that these exceptions are narrowly construed reflects that the preference of states still accords with the overarching construct of *mare liberum*.

IV. INCREASING EXCEPTIONS: "POWERS CONFERRED BY TREATY"

Although Article 110 of UNCLOS only lists four specific instances where the right of visit may be exercised,[107] that convention further recognizes that additional grounds for conducting the right of visit may be established by treaty.[108] Article 6

Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, 13 MARINE POL'Y 218, 228 (1989).

102. CHURCHILL & LOWE, *supra* note 22, at 214.

103. *See id.*; *see also* Jeffrey D. Stieb, *Survey of United States Jurisdiction over High Seas Narcotics Trafficking*, 19 GA. J. INT'L & COMP. L. 119, 131-32 (1989) (arguing that the Court in *Marino-Garcia* erred and that it should have had regard to the nationality of the individual defendants).

104. *See* Guilfoyle, *supra* note 83.

105. *See supra* notes 56 – 64 and accompanying text (referring to the general requirements for boarding during the exercise of the right to visit).

106. UNCLOS, *supra* note 21, art. 110(3) (provided that the ship boarded has not committed any act justifying the suspicions in the first instance).

107. As noted above, Article 110 deals with the right to visit on the high seas, but states are accorded enforcement jurisdiction for other specified purposes under UNCLOS in relation to their powers over the EEZ. *See supra* note 59 and accompanying text.

108. Article 110 commences with "[e]xcept where acts of interference derive from powers

of the 1958 High Seas Convention similarly permitted states to consent to interference with their vessels only "in exceptional cases expressly provided for in international treaties."[109] States are entitled to enter into formal agreements to limit their sovereignty in relation to their authority over vessels flagged to them on the high seas. Consent may be accorded in an ad hoc manner, which has been regarded as consistent with the freedoms of the high seas. As a United States court has noted in relation to the boarding and seizure of the *Persistence* on the high seas:

> The practice of obtaining prior consent of the foreign flag state is apparently a fairly common one... and we see nothing to suggest that it is improper. The policy behind Article 6 [of the 1958 High Seas Convention] is that of ensuring freedom of access to the high seas by preventing arbitrary interference with vessels of one state by those of another... Permitting the flag state to authorize boarding by a foreign vessel in no way interferes with this policy; indeed, it can only further the recognition in Article 6 of the flag state's ability to exercise authority over its vessels.[110]

The right of states to formulate specific agreements to permit the boarding and possible seizure of vessels has been accorded in response to efforts to suppress certain criminal acts. An early example was when the United States entered into a treaty with the United Kingdom in its efforts to prevent the importation of liquor into its territory during the Prohibition era.[111] More recently, states have established boarding procedures in cooperative efforts to deal with unlawful fishing,[112] migrant smuggling,[113] and the illicit trafficking in narcotic drugs and

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conferred by treaty . . . ." UNCLOS, *supra* note 21, art. 110(1).

109. Article 6(1) reads: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry." High Seas Convention, *supra* note 35, art. 6(1).

110. *United States v. Green*, 671 F.2d 46, 51 (1982) (footnotes omitted).

111. Convention Between the United Kingdom and the United States of America Respecting the Regulation of the Liquor Traffic, U.S.-U.K, Jan. 23, 1924, 22 U.K.T.S. 1924, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1924/18.html; *see also* John Siddle, *Anglo-American Co Operation in the Suppression of Drug Smuggling*, 31 INT'L & COMP. L.Q. 726 (1982).

112. *See, e.g.*, Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 21(1), Dec. 4, 1995, 34 I.L.M. 1542, U.N. GAOR, 6th Sess., U.N. Doc. A/CONF.164/37, *available at* http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm [hereinafter "Fish Stocks Agreement"]. Flag States are obliged to undertake a range of actions to ensure that their national vessels comply with regional conservation and management measures, and, if a member of a regional organization, have certain rights of inspection over other members, as well as non-members where those non-members are party to the Fish Stocks Agreement. *Id.*, arts. 21-22. The novelty of an "inspecting State" regime has been commented on as follows:

> This is one of the most interesting and controversial provisions in the [Fish Stocks Agreement]. It creates a new regime, moving away from the principle of exclusive flag state jurisdiction over vessels on the high seas, by introducing a

psychotropic substances.[114] The latter is examined in more detail in this Part, both by way of example of how states have crafted additional bases for the right of visit and because of the influence these boarding provisions provided in the formulation of the ship-boarding procedure adopted in the 2005 Protocol.

UNCLOS requires states parties to cooperate in their efforts to suppress the illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas.[115] There is no specific right granted to warships in UNCLOS to visit, board and seize a vessel if there is a reasonable suspicion that a vessel is engaged in this illicit trade.[116] Instead, all that is anticipated is that the flag state may request the assistance of other states,[117] rather than another state initiating action or undertaking more precise measures with a flag state that possibly has vessels involved in drug trafficking on the high seas.[118]

The 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[119] built on the general requirement under UNCLOS to cooperate in the suppression of illicit drug trafficking on the high seas by allowing the interception of a ship suspected of illicit trafficking by a state other than the flag state.[120] Suggestions that there should be consideration of arrangements for law enforcement authorities to board vessels flying foreign flags were initially considered "inappropriate" and best left to bilateral and regional arrangements.[121] The Vienna Convention did not ultimately provide a general grant of authority for the right to visit foreign vessels suspected of involvement in drug trafficking. Instead, Article 17 sets up a procedure whereby a state party may request permission to board a vessel of another state party when the ship is outside the

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new legal concept in the law of the sea, namely, 'the inspecting State'.

Peter Orebech, Ketill Sigurjonsson & Ted L. McDorman, *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement* 13 INT'L J. MARINE & COASTAL L. 119, 131 (1998).

113. *See* Protocol to the UN Convention against Transnational Organized Crime, Dec. 12, 2000, U.N. GAOR 55th Sess., UN Doc. A/RES/55/25, Annex III (2001) (not in force) *available at* http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf . *See also* IMO Interim Measures For Combating Unsafe Practices Associated With The Trafficking Or Transport Of Migrants By Sea, IMO Circular, MSC/Circ.896, Mar. 4, 1999, Annex.

114. UNCLOS, *supra*, note 21, art. 108.

115. *Id.* art. 108(1).

116. The existence of a customary international law right was denied by Italy's highest court in 1992. *See* Erik Franckx, *Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea*, 8 Tul. J. Int'l & Comp. L. 49, 68 (2000).

117. UNCLOS, *supra* note 21, art. 108(2).

118. William C. Gilmore, *Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 15 MAR. POL'Y 183, 185 (1991) [hereinafter Gilmore, *1988 UN Convention*].

119. Vienna Convention for the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, UN Doc. E/CONF.82/15, 28 I.L.M. 497 (1989), entered into force Nov. 11, 1990 [hereinafter Vienna Convention].

120. Prescriptive jurisdiction is established under Article 4 of the Vienna Convention. *Id.* art. 4.

121. *See* Gilmore, *1988 UN Convention*, *supra* note 120, at 185 (referring to the response of the relevant expert group involved in drafting the Vienna Convention to a Canadian proposal).

territorial sea of any state.[122] Authorization may be afforded on an ad hoc basis, or by means of separate agreements or arrangements otherwise reached between the states parties.[123]

Certain protections are also accorded to the flag state within the Vienna Convention, in recognition of its preeminent position on the high seas. A flag state is permitted to subject its authorization to conditions to be mutually agreed between it and the requesting party.[124] Moreover, Article 17 does not set any precise timeframe for the authorization by the flag state, but simply requires a party to "respond expeditiously to a request from another party" regarding the nationality of a vessel and authority to board.[125]

In response to illicit drug trafficking into its territory, the United States has pursued a range of legal strategies, both within its domestic law,[126] and in cooperation with other states.[127] The United States and the United Kingdom entered into a bilateral agreement in 1981 to permit the interdiction of British-flag vessels in designated areas of the Caribbean, Gulf of Mexico, and Atlantic Ocean when those vessels were suspected of trafficking in drugs.[128] Reciprocal rights are not accorded to the United Kingdom in relation to any United States vessel. "Its provisions are designed solely to facilitate the effective enforcement of US law subject to a number of safeguards for the UK."[129] At the time of its adoption, the Exchange of Notes was described as a "significant departure from the customary rule that on the high seas jurisdiction follows the flag."[130] The United Kingdom further emphasized that the agreement was not to be regarded as a precedent for the conclusion of any further agreement affecting British vessels on the high seas.[131]

Through this treaty, consent to the visit, search and seizure of the vessel is given in advance and so no further authorization is needed at the point that a vessel wishes to conduct a boarding.[132] A boarding by the United States Coast Guard

122. Vienna Convention, *supra* note 119.

123. *Id.* 17(9).

124. *Id.* 17(6).

125. *Id.* art. 17(7).

126. *See* Siddle, *supra* note 111, at 730-32.

127. One example is a "shiprider" agreement between the United States and Trinidad and Tobago where law enforcement officers of one state right on law enforcement vessels of the other. See CHURCHILL & LOWE, *supra* note 22, at 220, and n. 43.

128. Great Britain and Northern Ireland: Narcotic Drugs: Interdiction of Vessels, Exchange of Notes concluded Nov. 13, 1981, 33 U.S.T. 4224; 1981 U.S.T. LEXIS 91 [hereinafter Exchange of Notes].

129. William C. Gilmore, *Narcotics interdiction at sea: UK-US cooperation*, 13 MAR. POL'Y 218, 222 (1989) [hereinafter Gilmore, *UK-US cooperation*].

130. Siddle, *supra* note 111, at 726. *See also* Gilmore, *UK-US cooperation*, *supra* note 129, at 226 (referring to a statement of the then Attorney General of the United Kingdom that the agreement was "quite a compromise of important principles").

131. *See* Siddle, *supra* note 111, at 739 (referring to statements made in the UK Parliament, and in the letter accompanying the agreement). *See also* Gilmore, *UK-US cooperation*, *supra* note 129, at 226.

132. The Exchange of Notes provides that the United Kingdom "will not object to the boarding by the authorities of the United States" Exchange of Notes, *supra* note 128, art. 1.

would only be justified if there was a reasonable belief that the vessel had on board a cargo of drugs for importation into the United States.[133] Upon boarding, the United States Coast Guard was required to take necessary steps to establish the place of registration of the vessel, and if these steps suggested that a drug trafficking offense under United States law was being committed, could proceed to search the vessel and then seize it and take it to a United States port.[134] In this situation, the United Kingdom did reserve its right to object to the continued exercise of United States jurisdiction and could thereby forestall forfeiture proceedings.[135] Furthermore, the United Kingdom reserved the right to object to the exercise of jurisdiction over any of its nationals who may have been arrested at the time of the seizure of the vessel, and in which case the United States would be required to release those nationals.[136]

Another separate agreement that contemplates ship boarding in relation to drug trafficking is the 1995 Council of Europe Agreement on Illicit Traffic by Sea.[137] The European Agreement has been described as "intimately connected" with the Vienna Convention, and any proposals during negotiations that were contrary to the letter or spirit of the Vienna Convention were not acceptable.[138] Article 6 of the European Agreement retained the need for flag state authorization prior to the boarding of a ship by another state party.[139] Proposals relating to the treaty itself affording consent to a boarding by states parties, or that tacit consent could be established when a flag state failed to respond to a request were rejected.[140] The European Agreement does, however, permit either the state conducting the boarding or the flag state then to prosecute any offenders, with the flag state being accorded preference in such a situation of concurrent jurisdiction.[141]

With each of these agreements, the efforts to establish ship-boarding procedures have been faced with the entrenched construct of the freedom of the high seas and the paramountcy of flag state control over its vessels on the high

133. *Id.* art. 1.

134. *Id.* art. 2-3.

135. *Id.* art. 4.

136. *Id.* art 5. The situation of other nationals may not be affected by this provision, but the United Kingdom has noted that all persons should be accorded equal treatment and did not deny that the prosecution of nationals of other states would be of primary concern to their state of nationality. Siddle, *supra* note 111, at 743 (referring to the United Kingdom note accompanying the agreement).

137. Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Jan. 31, 1995, E.T.S. 156 [hereinafter European Agreement].

138. William C. Gilmore, *Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement*, 20 MAR. POL'Y 3, 4 (1996) [hereinafter Gilmore, *Europe Agreement*]. The link between the agreements is reinforced by the fact that only states party to the Vienna Convention could also become parties to the European Agreement. *See* European Agreement, *supra* note 137, art 27(1).

139. *See* European Agreement, *supra* note 137, art 6.

140. Gilmore, *Europe Agreement, supra* note 138, at 7. Gilmore does note that some of the negotiating parties were willing to permit a more liberal approach to boarding than was enshrined in Article 6 and so predicted the possibility of further bilateral agreements. *Id.*

141. European Agreement, *supra* note 137, arts 3, 10, and 14.

seas. The derogations from the traditional paradigm to deal with the illicit trade in drugs have involved precise strictures as to when the right of visit may occur, and what safeguards are to be afforded to the foreign-flagged vessel in these instances. What might have been considered a common interest in reducing unlawful trafficking in narcotic drugs and psychotropic substances, was superseded by what was perceived as a greater common interest in adhering to the principle of *mare liberum*.

V. PRESSURE ON THE PARADIGM: SECURITY INTERESTS AND THE RIGHT OF VISIT

The traditional paradigm whereby the high seas are open to all users and states may only exercise authority over foreign vessels in limited circumstances renders threats to maritime security more acute. These threats include terrorists using a small boat as a weapon against a larger ship; terrorists seizing a vessel and destroying it to wreak havoc at ports or in straits; vessels being used to ship terrorists and their weapons and supplies to destinations around the globe.[142] Even beyond the efforts of these non-state actors, some states could be involved in shipping conventional arms or weapons of mass destruction for use by terrorists.[143]

The right of visit during times of armed conflict is more extensive under the laws of naval warfare compared to the limited grounds recognized in Article 110 of UNCLOS. As a general matter, enemy and neutral merchant vessels are exempted from attack during a time of armed conflict.[144] However, the laws of naval warfare permit a warship to exercise the right of visit and search of a merchant vessel flying a neutral flag if it is suspected that the vessel in fact belongs to the enemy, or if the vessel is outside neutral waters and subject to capture.[145] The right to search and visit neutral merchant vessels is premised on the need to prevent the possible passage of military contraband to the enemy.[146] Given that interference with neutral shipping may constitute a use of force, the extent of interference allowed depends on the defensive necessity of the belligerent.[147] A belligerent commander may also subject enemy merchant ships to visit and search, which may result in the seizure of the vessel as prize, and possibly its destruction.[148]

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142. "It has been reported that al Qaeda owns or controls about 15 cargo ships that could be used as floating bombs against cruise ships and other high interest vessels, or to smuggle explosives, chemical or biological weapons, such as a radioactive dirty bomb into a US port, or to transport al Qaeda members into a third country." Roach, *supra* note 98, at 42.

143. *Id.*

144. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES 102-03 (2004).

145. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 365-66 (2004); DINSTEIN, *supra* note 144, at 217. An exception exists when the merchant vessel is bound for a neutral port and is under convoy of accompanying neutral warships. MANUAL OF THE LAW OF ARMED CONFLICT, at 366. *See also* DINSTEIN, *supra* note 144, at 104.

146. HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 302 (1992).

147. *Id.*, at 304.

148. LESLIE C. GREEN, CONTEMPORARY LAW OF ARMED CONFLICT 163 (1993); DINSTEIN, *supra* note 144, at 215-16.

Although van Dyke takes the view that "the relationship between the law of the sea and the laws of armed conflict has always been fuzzy",[149] it seems that the so-called "war on terror" does not trigger this body of law.[150] A "right of stop and inspect", which is distinguished from the right of visit, is used to refer to actions taken to enforce United Nations sanctions as part of maritime interception operations.[151] The Security Council has authorized such interdictions under Chapter VII of the UN Charter in relation to the 1991 Gulf War and the action in Afghanistan in 2001,[152] as well as in connection with the 1991-1993 war in Yugoslavia, the 1993-94 conflict in Haiti, and the 1997 civil war in Sierra Leone.[153]

Reference to the right of self-defense has also been reasserted as a legal justification for the boarding of foreign vessels on the high seas.[154] After

149. Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 MARINE POL'Y 107, 121 (2005). It has been suggested that UNCLOS now replaces many of the rights and responsibilities drawn from the laws of naval warfare and that those laws are generally no longer valid due to the prohibition on the use of force in the UN Charter. *See* A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, in* 64 INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 111, 130-133 (Horace B. Robertson ed., 1991). Alternatively, Astley and Schmitt consider that the law of the sea is mostly consistent with the laws of war, particularly those rules relating to neutrality. John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 AIR FORCE L. REV. 119, 138 (1997) ("the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict"). Finally, it has been argued that UNCLOS was envisaged as a treaty for times of peace and is thus not applicable at all during armed conflict. Elmar Rauch, *Military Uses of the Oceans* [1984] 28 JAHRBUCH FÜR INTERNATIONALES RECHT 229, 233 (1985) ("To be sure, the new Convention constitutes part of the law of peace and is not intended to regulate the law of naval warfare.").

150. In any discussion of the legality of the PSI, for example, the right of visit on the high seas has been addressed under the terms of UNCLOS and not by reference to law of naval warfare. *See, e.g.*, Logan, *supra* note 15; *See, e.g.*, Kaye, *supra* note 15. *Cf* Douglas Guilfoyle, *The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction*, 29 MELB. U. L. REV. 733 (2005) (discussing the PSI in the context of belligerent rights).

151. Astley & Schmitt, *supra* note 149, at 146 (referring to a right to approach and visit as a law enforcement activity).

152. MARK J. VALENCIA, THE PROLIFERATION SECURITY INITIATIVE: MAKING WAVES IN ASIA (ADELPHI PAPERS) 34 (2005) (referring to Maritime Interdiction Operation under resolutions relating to Iraq, and the Leadership Interdiction Operation and NATO's Operation Active Endeavour targeting the Taliban and al Qaeda operatives). *See also* Garmon, *supra* note 70, at 273-74 (referring to interdictions in the search for members of al Qaeda).

153. Jon M. Van Dyke, *Perspective: Balancing Navigational Freedom with Environmental and Security Concerns*, 2003 COLO. J. INT'L ENVTL. L. & POL'Y 19, 25 (2003) (hereinafter Van Dyke, *Perspective*]. Resolution 1540, which was adopted in 2002, requires states to prohibit and criminalize the transfer of weapons of mass destruction and delivery states to non-state actors, but does not specifically permit interdiction for these purposes. S.C. Res. 1540, ¶ 2, U.N. Doc. S/RES/1540 (Apr. 27, 2004).

154. Churchill and Lowe point to earlier examples of interference with shipping based on claims to self-defence, but indicate that the response to France's interdictions during the Algerian emergency of 1956-62, and the practice of the United Kingdom in not interfering with French shipments of arms to Argentina during the 1982 Falklands/Malvinas conflict may have represented a shift against this justification for the boarding of foreign vessels on the high seas. CHURCHILL & LOWE, *supra* note 22, at 216-17.

September 11, 2001, the United States began boarding vessels in the Indian Ocean, the Red Sea and the Strait of Hormuz looking for Osama bin Laden and al Qaeda associates.[155] Although consent from masters was generally sought for these inspections, the United States notified the maritime industry that it would compel boarding if the vessel was suspected of transporting terrorist suspects.[156] The specific legal basis for this action was never explicitly articulated, but President Bush generally referred to acts of self-defense in response to the attacks by al Qaeda.[157] United States officials also initially characterized the PSI by reference to the right of self-defense.[158] This position has been soundly criticized by commentators,[159] however, and has not been part of more recent rhetoric on the PSI.

In view of the limitations imposed by the traditional construct of the law of the sea, as well as ambiguities associated with the laws of armed conflict as applicable to current security concerns about terrorist attacks and the proliferation of weapons of mass destruction, states have instituted efforts on the basis of multilateral cooperation, through bilateral agreement, and even unilateral actions, in order to enhance their efforts in ensuring their maritime security. Those examined immediately below are the PSI, the bilateral ship-boarding agreements pursued by the United States, and Australia's establishment of a Maritime Identification System.

A. Proliferation Security Initiative

The PSI was initially conceived as a "collection of interdiction partnerships",[160] among eleven core members, subsequently expanding to fifteen core members,[161] as well as receiving the support of another sixty states.[162] In agreeing on a non-binding Statement of Interdiction Principles, the participants committed themselves to establishing "a more coordinated and effective basis through which to impede and stop shipments of [weapons of mass destruction], delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council."[163]

155. Van Dyke, *Perspective*, *supra* note 153, at 25.

156. *Id.* at 25.

157. *Id.*

158. As US Undersecretary of State, John Bolton has referred to the PSI as part of the general right of self-defense allowing for the interdiction of North Korean vessels. *See* Garvey, *supra* note 24, at 134.

159. *See, e.g.*, Garvey, *id. at* 134-36.

160. *Id.* at 129. *See also* Logan, *supra* note 15, at 255 (referring to the PSI as a "loose alliance").

161. These core members are Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, Russia, the UK and the US. In August 2005, the core group was dismantled, particularly because it was not needed once the basic principles of interdiction were established. VALENCIA, *supra* note 152, at 29.

162. *See* United STATES DEPARTMENT OF STATE, PROLIFERATION SECURITY INITIATIVE FREQUENTLY ASKED QUESTIONS (FAQS) (May 26, 2005), http://www.state.gov/t/isn/rls/fs/46839.htm.

163. Statement of Interdiction Principles, *supra* note 16.

The intention of the PSI is not to create legally binding commitments,[164] but as an alternative, the Statement of Interdiction Principles calls on states to "take specific actions in support of interdiction... to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks."[165] From a policy perspective, the PSI is described as "a multilateral intelligence-sharing project incorporating cooperative actions and coordinated training exercises to improve the odds of interdicting the transfer of weapons of mass destruction."[166]

As the Statement of Interdiction Principles intends participants to take action "to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks,"[167] the PSI is immediately constrained by the traditional requirements of exclusive flag state control and the freedom of the high seas. In recognition of the greater authority that states have over their ports, internal waters and territorial seas, the participant states are committed to taking appropriate action in respect of vessels that are reasonably suspected of carrying cargos of proliferation concern in these maritime areas.[168] These actions may involve stopping and/or searching vessels in internal waters, territorial seas or contiguous zones (where states have declared the latter), or enforcing conditions on vessels that enter or leave ports, internal waters or territorial seas that require the boarding, searching and seizure of cargos of proliferation concern.[169] While states have sovereignty over territorial seas, there is no authority to disrupt the passage of vessels through those waters unless the passage is prejudicial to the peace, good order or security of the coastal state; in other words, if it is not innocent passage.[170] Commentators have raised doubts that the mere passage of weapons of mass destruction through the territorial seas is a violation of the right of innocent passage.[171] Garvey, for example, argues that the

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164. Ted L. McDorman, *From the Desk of the Editor-in-Chief: An Information Note on the Proliferation Security Initiative (PSI)*, 36 OCEAN DEV. & INT'L L. 381, 382 (2005). The level of participation required has been vividly described by Joseph:

> One can liken PSI and its day-to-day execution to that of a deputized posse: the United States and a group of other like-minded states, using existing legal powers, have organized to hunt down illicit shipments of dangerous weapons. On any particular day, some members of that posse may choose not to ride out.

Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?*, ARMS CONTROL TODAY, June 2004, at 8. *See also* Andrew C. Winner, *The Proliferation Security Initiative: The New Face of Interdiction*, 28 WASH. Q. 129, 130 (2005).

165. Statement of Interdiction Principles, *supra* note 16, at Principle 4.

166. Joseph, *supra* note 164, at 6.

167. Statement of Interdiction Principles, *supra* note 16, at Principle 4.

168. *Id.* at Principle 4(d).

169. *Id.*

170. UNCLOS, *supra* note 21, at art. 19(1) ("Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.")

171. Andrew Prosser & Herbert Scoville, Jr., *The Proliferation Security Initiative in Perspective*, 3 (June 16, 2004), http://www.cdi.org/pdfs/psi.pdf. *See also* Logan, *supra* note 15, at 259 (2005) ("it is not the mere transport of WMD that threatens a state's sovereignty, but the use of these weapons against it"); Joyner, *supra* note 48, at 542 ("with few exceptions there is very little hard or formal international law not only on the question of transfers of nuclear, chemical, and biological materials,

right of innocent passage "is not offended by a shipment of [weapons of mass destruction] material that does not constitute a threat to the coastal state, which of course would describe the typical situation, in that the threat presented by [weapons of mass destruction] material is determined by the intended use at the point of destination, not transit."[172]

Participant states are committed to taking action to board and search any vessel flying their own flag when those vessels are either in their territorial seas or internal waters, or when those vessels are outside the territorial waters of another state.[173] Even where vessels are flagged to the participant states, then these states commit to giving serious consideration as to whether other states should be permitted to board and search those vessels in pursuit of the PSI objectives.[174] The ongoing deference to the flag state's control affirms that the PSI is not intended to create a new right of visit on the high seas. The problem therefore faced is that it remains unlikely that vessels flagged to states of concern will agree to their ships being boarded on the high seas. North Korea, for example, has strenuously objected to the PSI, demanding that the Bush administration explicitly renounce any intent to confront North Korea economically or militarily.[175] North Korea has also asserted that any interdiction of its vessels, or a blockade, would be viewed as an act of war, and thereby abrogates the Armistice Agreement that ended the Korean War.[176] As Lehrman correctly notes, "principles of international maritime law may frustrate the implementation of the PSI in particular contexts and situations."[177]

B. Bilateral Ship-Boarding Agreements

Adhering more closely to the traditional paradigm, the United States has sought to enter into ship-boarding agreements with states holding the largest shipping registries, and hence the greatest number of flag vessels, in order to establish authority to board vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems, or related materials. In pursuit of this policy, the United States has signed ship-boarding agreements with Belize, Croatia, Cyprus, Liberia, Marshall Islands and Panama.[178] According to

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agents, and compounds and the associated myriad dual-use items and technologies that could be used to turn those materials into weaponized devices, but even more fundamentally on the question of the possession of such technologies.").

172. Garvey, *supra* note 24, at 131. Equally, it has been observed that UNCLOS does not foreclose such an interpretation. *See* Lehrman, *supra* note 49, at 232. *See also* Kaye, *supra* note 15, at 214 ("Clearly the delivery of WMD to terrorists may well be highly prejudicial to the peace, good order and security of a coastal State, and an argument could be made that such a passage is therefore not innocent, and the restrictions on coastal State authority over the passing vessel are removed.").

173. Statement of Interdiction Principles, *supra* note 16, at Principle 4(b).

174. *Id.*, Principle 4(c).

175. Mark J. Valencia, *Unsettling Asia for Security's Sake*, FAR E. ECON. REV., Mar. 1, 2005, at 55, 56.

176. *Id.* at 56. *See also* VALENCIA, *supra* note 152, at 61.

177. Lehrman, *supra* note 49, at 228.

178. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass

the United States, the "combination of states with which we have signed bilateral ship boarding agreements, plus the commitments made by other Proliferation Security Initiative partners under the Statement of Interdiction Principles, translates into more than 60 percent of the global commercial shipping fleet dead weight tonnage now being subject to rapid action consent procedures for boarding, search, and seizure."[179]

A significant aspect of these bilateral treaties is that a flag state has a limited time to respond to a request for authority to board a suspect vessel.[180] The time allowed for a response is two hours for Belize, Liberia and Panama; and four hours for Cyprus and the Marshall Islands.[181] If there is no response within that time, the

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Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Liber., Feb. 11, 2004, KAV 7065; Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, U.S.-Pan., May 12, 2004, http://www.state.gov/t/isn/trty/32858.htm; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Marsh. Is., Aug. 13, 2004, KAV 7064; Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials, U.S.-Croat., June 1, 2005, http://www.state.gov/t/isn/trty/47086.htm; Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Cyprus, July 25, 2005, http://www.state.gov/t/isn/trty/50274.htm; Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Belize, Aug. 4, 2005, http://www.state.gov/t/isn/trty/50809.htm. The significance of these agreements has been noted by Joseph: "More than half of the world's shipping, measures on the basis of gross tonnage, now is registered in six states: Liberia, Panama, the Bahamas, Malta, Cyprus, and the Marshall Islands." Joseph, *supra* note 164, at 12.

179. Media Note, Office of the Spokesman, The United States and Belize Proliferation Security Initiative Ship Boarding Agreement (Aug. 4, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/50787.htm

180. *See* Garvey, *supra* note 24, at 133.

181. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(b); Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, *supra* note 178, at art. XXX; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(b); Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 780, at art. 4, ¶ 3(c); Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of

requesting country is deemed to have conferred such authority (a notable exception to this is the US-Croatia ship-boarding agreement).[182] This system of implied consent has been subject to criticism, as it reflects the unequal bargaining power of the United States vis-à-vis Belize, Liberia, Panama, Cyprus and the Marshall Islands. Garvey notes: "Two hours is obviously a period of time grossly inadequate to assess the credibility of a request for interdiction and the interests involved."[183] At best, this notification period could be described as "window-dressing" for sovereign equality.[184]

These ship-boarding agreements are consistent with "shiprider agreements" that the United States has entered into with other states to permit boarding and searching of vessels flagged to those other states in order to curb drug-trafficking.[185] These treaties are "typically bilateral agreements that provide a mechanism, customized to the conditions and capabilities of the parties to the agreement, whereby law enforcement officials of either party may receive preauthorization to board and search flag vessels of the other state for the purpose of curbing the illicit traffic in drugs."[186] As such, the new bilateral ship-boarding agreements that are specifically directed at countering terrorist threats constitute "powers conferred by treaty" under Article 110 of UNCLOS to permit the right of visit that would not otherwise be countenanced under the freedoms of the high seas. The bilateral agreements permitting a right of visit then provided another model for ship-boarding on which the United States could draw in coordinating the negotiations on the 2005 Protocol. However, as will be discussed below, once the

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Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(e)(1).

182. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(d); Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, *supra* note 178, at art. XXX; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(d); Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 4; Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, *supra* note 178, at art. 4, ¶ 3(e)(2).

183. Garvey, *supra* note 24, at 133. Only the treaty with Belize explicitly allows for the possibility of seeking additional time to reply.

184. *Id.*, at 142, n. 66 (2005). Guilfoyle argues, on the other hand, that "this may represent a means for a small State to externalize some of its security or reputation costs." Guilfoyle, *supra* note 83, at 23.

185. Lehrman, *supra* note 49, at 228, 236.

186. *Id.* at 228, 236-37. *See also supra* Part IV.

United States was placed in a multilateral negotiating context, its ability to trump the traditional paradigm was considerably undermined.

C. Australian Maritime Identification System

In contrast to the multilateral endeavors of the PSI and the bilateral agreements initiated by the United States, the Australian Maritime Identification System (AMIS) was a unilateral declaration intended to enhance the maritime security of Australia.[187] The AMIS was instituted to enable a Joint Command of the Australian Defence Force and the Australian Customs Service to identify vessels intending to enter Australian ports, as well as all vessels entering Australia's Exclusive Economic Zone.[188] These vessels are "to provide comprehensive information such as ship, identity, crew, cargo, location, course, speed and intended port of arrival."[189] The provision of this information is intended to enhance the effectiveness of civil and military maritime surveillance, particularly in protecting offshore oil and gas facilities from terrorism.[190] The AMIS extends 1,000 nautical miles from Australia's coast and thereby encompasses ocean areas that would have otherwise been high seas.[191]

Australia's right to request this information from vessels seeking to enter its ports does not run contrary to the freedom of navigation, but is consistent with its rights under recent changes to the Safety of Life at Sea Convention (SOLAS),[192] and the adoption of the International Ship and Port Facility Security Code (ISPS Code).[193] In addition to these rights under SOLAS, Australia would still be entitled to seek this identification information from vessels seeking to enter its ports under UNCLOS or customary international law, as merely requesting

187. Australia had announced at the end of 2004 that it would institute a 1,000 nautical mile "Maritime Identification Zone" as part of Australia's efforts to strengthen its offshore maritime security. Press Release, Media Release of the Prime Minister of Austl., John Howard, Strengthening Offshore Maritime Security (Dec. 14, 2004), *available at* http://www.pm.gov.au/news/media_releases/media_Release1173.html [hereinafter PM Media Release]. After Australia's neighbors voiced concern over the reach of this maritime claim, the policy was reformulated as the AMIS. No official announcement of the change appears to have been made, but government officials began referring to a "system" rather than a "zone". The 1,000 nautical mile reach does not appear to have been changed. *See* DEPARTMENT OF TRANSPORT AND REGIONAL SERVICES BACKGROUND BRIEFING PAPER, STRENGTHENING AUSTRALIA'S OFFSHORE MARITIME SECURITY (2005), *available at* http://www.infrastructure.gov.au/transport/security/maritime/pdf/Strengthening_offshore.pdf [hereinafter DOTARS Briefing Paper]; Deputy Secretary Andrew Metcalfe, *Advancing the Coordination of National Security in Australia* (Feb. 21, 2005), *available at* http://www.pmc.gov.au/speeches/metcalfe/coordination_national_security_2005-02-21.cfm.

188. PM Media Release, *supra* note 187.

189. *Id.*

190. *Id.*

191. *Id.*

192. SOLAS, supra note 6.

193. *See* IMO adopts comprehensive maritime security measures, Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 9-13 Dec 2002, *available at* http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689. The ISPS Code is mandatory for all states parties to SOLAS. Australia has implemented the ISPS Code through the Maritime Security Act, adopted on 1 July 2004.

information would not constitute an unreasonable infringement on the freedom of navigation.[194]

Beyond simply requesting information, the Australian Prime Minister announced that the Australian Defense Force would "take responsibility for offshore counter-terrorism prevention, interdiction and response capabilities and activities."[195] However, any efforts at interdiction to enforce the information requirement on the high seas would be unlawful.[196] There is no exception to flag state authority on the high seas that would permit the right of visit to enforce a coastal state requirement to provide information in pursuit of that state's maritime security policies. Even under SOLAS, if a master of a vessel fails to comply with a request for information, the only consequence is that the vessel may not be allowed to enter the port of that particular state.[197] For enforcement under the ISPS Code, the emphasis is for port states to expel the ship from port, refuse entry to port or curtail the operations of the ship (such as delaying the vessel in port while further security measures are undertaken).[198] The developments under SOLAS in relation to maritime security do not provide any new treaty basis to exercise the right of visit.

Any attempt by Australia to secure identification information from all vessels, except day recreational vessels, that enter its EEZ would also likely constitute an unlawful assertion of both prescriptive and enforcement jurisdiction.[199] Australia does not have any special entitlement by virtue of its position as a coastal state to require vessels to provide security-related information.[200] As a coastal state, Australia has sovereign rights "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil",[201] as well as "with regard to other activities for the economic exploitation and exploration of the zone."[202] Jurisdiction is then accorded to Australia for the establishment and use of artificial islands, installations and structures, marine scientific research, and

194. Natalie Klein, *Legal Implications of Australia's Maritime Identification System*, 55 INT'L. & COMP. L.Q. 337, 343-45 (2006).

195. PM Media Release, *supra* note 187.

196. *See* Klein, *supra* note 194, at 345-50.

197. IMO, *Guidance to Masters, Companies and Duly Authorized Officers on the Requirements Relating to the Submission of Security-Related Information Prior to the Entry of a Ship into Port*, MSC/Circ.1130, Dec. 14, 2004, annex, para. 4, *available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10885/1130.pdf*, .

198. *See Id.*

199. *See* Klein, *supra* note 194, at 352-57.

200. This situation will change when a new Regulation on Long Range Identification and Tracking, which is included in Chapter V of the SOLAS Treaty comes into force at the end of 2008. This Regulation permits coastal states to request information as to a ship's identity, location and date and time of the position when those vessels are 1,000 nautical miles from the coast. See IMO, *Long range identification and tracking (LRIT), available at* http://194.196.162.45/Safety/mainframe.asp?topic_id=905.

201. UNCLOS, *supra* note 21, art. 56(1)(a).

202. *Id.* Art. 56(1)(c) also acknowledges that other provisions in UNCLOS may accord further rights to the coastal state in the EEZ.

the protection and preservation of the marine environment.[203] Notably, the coastal-state rights are for the promotion and protection of exclusive economic interests, rather than security interests. It can equally be observed that the enforcement powers accorded to Australia under UNCLOS are carefully defined so as to minimize the likelihood of coastal states interfering unnecessarily with navigation.[204]

Given that coastal states and third states both have continuing rights to exercise high seas freedoms in the EEZ, Australia may consider that seeking identification information from all vessels entering its zone is consistent with such rights. If there is a clash of interests between the exercise of the freedoms of the high seas, a due regard requirement is also imposed for the EEZ.[205] In this respect, the mutual due regard requirement may be infringed by Australia in demanding extensive identification information from all vessels, particularly when those vessels are merely in transit and do not intend to stop in an Australian port.[206] "[T]he comprehensive nature of Australia's information requirements may indicate that it has insufficient regard for the freedom of navigation."[207]

Faced with the strictures of the traditional paradigm, the AMIS is better justified if Australia is able to rely on the current security imperatives, which did not exist at the time of the adoption of UNCLOS, requiring that ocean traffic be more carefully monitored as part of a counter-terrorism strategy.[208] Australia could then argue that the identification information falls into a category of unattributed rights in the EEZ, as anticipated in Article 59 of the Convention.[209] In this situation, when regard may be had to all relevant circumstances and community interests in ensuring maritime security, Australia could well be justified in instituting the AMIS in respect of all vessels in its EEZ.[210]

D. Conclusion

Although the risks posed by and possible harm inflicted from terrorist attacks against maritime interests are apparent and a common interest in addressing these

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203. *Id.* at art. 56(1)(b).

204. Horace Robertson, *Navigation in the Exclusive Economic Zone*, 24 VA. J. INT'L L. 865, 902 (1984). *See also* Klein, *supra* note 194, at 356-57.

205. This requirement is incorporated into article 58, paragraph 3, of UNCLOS, *supra* note 21, whereby "[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State." Equally, under article 56(2), coastal states are to "have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".

206. Klein, *supra* note 194, at 358.

207. *Id.* at 360.

208. *Id.* at 359-60.

209. Article 59, *supra* note 21, reads: "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole."

210. Klein, *supra* note 194, at 360.

threats clearly exists, states have struggled to take appropriate action due to the preeminence accorded to high seas freedoms and flag state control. It has not been generally accepted that the laws of armed conflict, as well as the right of self-defense, provide additional means to visit and search vessels, unless a particular right has been sanctioned by the United Nations Security Council.

Faced with these inadequacies in the existing legal structure, states have opted for alternative processes that may afford the necessary authority to take the desired steps to support the shared interest in enhancing maritime security. The bilateral ship-boarding agreements initiated by the United States with the major shipping registry states fit within the contours of Article 110, as a right of visit has been granted to the United States as a "power[] conferred by treaty". These agreements are inherently limited given their bilateral status; only the United States or its bilateral partner has the right of visit, and so no ally of the United States automatically has the same right to do so in an area where a United States warship is not present.[211] A greater multilateral effort has been undertaken through the PSI, but this regime has also been constructed in such a way as to defer to the traditional paradigm and not encroach on inclusive interests. While the PSI could arguably form the basis of a new customary rule of international law, this likelihood is diminished by the deliberate efforts of participant states to cast the PSI as legally non-binding, by the lack of clarity associated with the articulated Principles, and by the deference accorded to the traditional rules. The unilateral effort of Australia in instituting the AMIS as an exclusive claim over ocean space triggered considerable concern among its neighbors and within the region,[212] and Australia has subsequently provided assurances that it will take no steps that would run contrary to existing rules of international law.[213] It thus becomes evident that states desirous of countering security threats have found that their efforts are curtailed by the traditional paradigm, partially because of their own preference not to destabilize this construct but also because of the resistance from other states to permit further derogation.

VI. THE RIGHT OF VISIT UNDER THE 2005 PROTOCOL

Revising the 1988 Convention presented another avenue to bring rules relating to the freedom of navigation and flag state authority into line with current security concerns.[214] The 1988 Convention was adopted with every intention of

211. Under the bilateral treaties with Liberia, the Marshall Islands and Panama, the possibility does exist for the United States to seek permission for third states. Any permission of course remains at the discretion of the flag state in this instance. *See* Natalie Klein, *Legal Limitations on Ensuring Australia's Maritime Security*, 7 MEL. J. INT'L L. 306, 330-32 (2006) (discussing Australia's rights under these bilateral treaties).

212. Klein, *supra* note 194, at 338-39.

213. Michelle Wiese Bockmann, *Maritime Zone Plans Scrapped*, THE AUSTRALIAN, July 11, 2005, *available at* www.theaustralian.news.com.au/common/story_page/0,5744,15887094%255E2702,00.html (referring to a statement of the Australian Customs Service).

214. "[A]s a matter of general approach to international regulations, a review of the SUA legal regime seems to be a natural course of action in order for states parties to be able to update such regulations in the light of current events on matters of maritime security." Jesus, *supra* note 60, at 390.

preserving the freedom of the high seas and demonstrating traditional deference to the powers of the flag state over its vessels on the high seas. Article 9 of that treaty explicitly states: "Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of states to exercise investigative or enforcement jurisdiction on board ships not flying their flag."[215] The inclusion of a new procedure for ship-boarding in the 2005 Protocol reverses this approach, and creates a new treaty power to exercise the right of visit. However, concerns about the impact of a new ship-boarding procedure on the freedom of navigation were apparent during the drafting of the 2005 Protocol. The rhetoric of the negotiations reflected the traditional paradigm of the freedom of the high seas and exclusive flag state control. For example, Mexico submitted:

> In the context of reviewing this international treaty and its protocol the key primary right is freedom of navigation, universally accepted under articles 87 and 89 of UNCLOS. ... It is therefore vitally important that in stipulating an exception to the freedom of navigation the SUA Convention and its Protocol leave no room for doubt as to its application and thus no scope for abuse of authority.[216]

A more nuanced approach was proposed by President Jesus, writing extra-judicially:

> As with everything in life, a balance of interests should be found between the different states. While jurisdiction to board, search, seize and arrest the ship and offenders should be accepted as another exception to the flag state exclusive jurisdiction on the high seas or in territorial waters in exceptional crime circumstances, such jurisdiction extension would have to be balanced with respect for flag state's rights, by adopting safeguard provisions on compulsory conflict resolution, compensation for damage and loss in case of unwarranted exercise of police jurisdiction, and sharing of information with the flag state as to the police action and its results.[217]

This Part analyses the ship-boarding procedure adopted in the 2005 Protocol, as a means of demonstrating the ongoing sway of the traditional paradigm and consequent detriment caused in obtaining the optimal balance of interests in countering threats to maritime security.

A. Procedure for Boarding Ships under the 2005 Protocol

The 2005 Protocol sets out in Article *8bis* procedures by which states parties may request that flag states of suspect vessels permit boarding outside the

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215. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 9, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention].

216. IMO Legal Committee, 88th Sess. Agenda item 3, *Review of SUA Convention and Protocol: Comments and proposals, Submitted by Mexico*, IMO Doc. LEG 88/3/1 (Mar. 19, 2004). This approach resonates with the much earlier position set forth in *Le Louis*: "Nor is it to be argued that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment." Le Louis, *supra* note 25.

217. Jesus, *supra* note 60, at 396.

territorial sea of any state. The three possible avenues by which a boarding may occur pay deference to the preeminence of the position of the flag state in its authority over vessels on the high seas.[218] The first avenue anticipates consent on an *ad hoc* basis. Second, consent is accorded implicitly if prior authorization is notified to the IMO Secretary-General and no response to a request is forthcoming from the flag state after four hours.[219] Finally, if prior authorization is notified to the Secretary General then consent is again considered implicit but there is no need to wait four hours for permission to visit the suspect vessel. Considerations in developing these procedures included minimizing the possible inconvenience that may be caused to a suspect vessel during its journey while still limiting the circumstances by which that vessel could escape inspection.[220]

1. General Requirements for Ship-Boarding

Before detailing the different avenues for securing consent to board set out in Article 8*bis*, common features of the ship-boarding procedures may be noted. In the first instance, Article 8*bis* is premised on the scenario of a state party wishing to board a vessel that either flies the flag or displays marks of registry of another state party. Consistent with traditional rules of treaty law, the terms of the 2005 Protocol only apply to those states parties to it, and do not create rights vis-à-vis third states.[221] The drafting of the 2005 Protocol considered how the nationality of vessels was to be described. A number of delegates supported inclusion of reference to a ship "claiming its nationality", but the compromise text settled on was "displaying marks or registry",[222] which provided greater precision than a claim to nationality.

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218. In its first articulation, the United States proposed two methods by which a flag state could authorize the boarding of one of its vessels outside of territorial waters: "either advance authorization when the enumerated conditions are met, or a procedure for granting authorization on an as-requested basis, including authorization when no reply is given within four hours." *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, *supra* note 9, para. 12. As the paragraph is finally drafted, the precise sequence of decision making is not completely clear and logical given the alternatives for authorizing boarding. It is submitted that an earlier proposed structure would have been preferable in this regard. *See* IMO Legal Comm. Working Group on the Review of the SUA Convention and Protocol, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, IMO Doc. LEG/SUA/WG.1/2 (June 30, 2004), para. 13 [hereinafter Review Working Group] (which delineates more clearly the alternatives and appropriate sequence of events).

219. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, *supra* note 9, para 12.

220. *Id.*

221. Vienna Convention on the Law of Treaties, art. 34, U.N. Doc. A/CONF. 39/27, May 23, 1969, 8 I.L.M. 679 ("A treaty does not create either obligations or rights for a third State without its consent.").

222. IMO Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, IMO Doc. LEG/SUA/WG.1/2/6, n. 32 (July 12, 2004).

A ship-boarding may only occur under the 2005 Protocol in relation to a vessel that is outside the territorial sea of any other state.[223] There is no suggestion in the 2005 Protocol that the boarding provisions will interfere with a coastal state's exercise of sovereignty over its territorial sea. Further, though, there is no explicit reference to the EEZ or the high seas and hence no overt recognition of how the rights of states may vary within these different maritime areas. This issue had proved polemic during the drafting of the Vienna Convention, with negotiating states settling on reference to vessels exercising the freedom of navigation in order to account for both the EEZ and the high seas.[224] In the 2005 Protocol, the only means by which any distinction is acknowledged is in respect of the safeguards to be in place during the boarding, and the requirement that a state party take due account of the need not to interfere with or affect "the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea."[225] It would appear that boarding must therefore take account of the right of coastal states in exercising sovereign rights and jurisdiction in the EEZ so as not to interfere with those rights.

Given that the 2005 Protocol is a treaty concerned with the prevention and suppression of terrorist acts against the safety of maritime navigation, there is a nexus between the rights to a board a vessel and the offenses set forth in the 1988 Convention and expanded in the 2005 Protocol. In setting out the offenses over which states may establish jurisdiction, Article 3 of the 1988 Convention included violence against or destruction of ships; seizure or exercising control over a ship by force or intimidation; and, communication of false information that endangers the safe navigation of the ship.[226] These offenses have been expanded under the 2005 Protocol to address acts such as the use of a ship in a manner that causes death or serious injury or damage; the use against or on a ship, or the discharge from a ship, of any explosive, radioactive material or biological, chemical or nuclear weapon; the transportation of any explosive or radioactive material knowing that it is to be used in a terrorist attack; and, the transportation of biological, chemical and nuclear weapons.[227]

For boarding to be authorized under the 2005 Protocol, a requesting state must have "reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence" as set out in Article 3, 3*bis*, 3*ter* or 3*quater* of the 1988 Convention and 2005 Protocol.[228] In the first draft, one of the conditions to authorize boarding was a reasonable suspicion of being involved in an offense, or a reasonable belief that the vessel was a target of one of those offenses.[229] This standard was subsequently

223. 2005 Protocol, *supra* note 2, art. 8bis, para. 5.

224. Gilmore, 1988 UN Convention, at 188-89, *supra* note 118.

225. 2005 Protocol, *supra* note 2, art. 8*bis*, para. 10(c)(ii).

226. SUA Convention, art. 3, *supra* note 214.

227. 2005 Protocol, *supra* note 2, art. 4, para. 5 (creating Article 3*bis* to the 2005 Convention).

228. *Id. at* art. 8*bis*, para 5.

229. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2002), *supra* note 9, Annex 1, p. 7.

tightened to refer to "reasonable grounds to believe" that a vessel "has been or is about to be involved in, or the target of, the commission of an offence."[230] This change was to align the terminology with the standards set out in UNCLOS, the Vienna Convention and the Migrant Smuggling Protocol.[231] However, in subsequent negotiations, preference was again expressed for reference to "reasonable grounds to suspect."[232]

A final common feature for the avenues to permit ship-boarding in the 2005 Protocol is that any request "should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information."[233] Notably, there is no requirement expressly imposed on the state requesting permission to board to provide information explaining why it has reasonable grounds to suspect that a ship or person on board a ship is involved in a proscribed act under the 1988 Convention or 2005 Protocol.[234] However, the right of the flag state to impose conditions on its authorization to board or the general reference to "other relevant information" may be enough to warrant the disclosure of evidence related to the suspected offenses if desired by the flag state.

A request may be issued orally, but must be confirmed in writing as soon as possible. It is incumbent on the flag state to acknowledge receipt of any oral or written request immediately.[235] Although not completely clear on the face of the text, it appears that in making the request, the requesting state also seeks

230. IMO Legal Committee, 86th Sess., *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, IMO Docs. LEG 86/5 (Feb. 26, 2003) & LEG 86/5/Corr.1 (Mar. 13, 2003), Annex 1, Article 8*bis* para. 2, p. 6.

231. Referring to Articles 108(2), 17(20) and (3), and 8(1) and (2) of these instruments, respectively. *See Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2003), *supra* note 229, Annex 1, note xxiii, pp. 22-23.

232. IMO Legal Committee, 87th Sess., Agenda item 5, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, IMO Doc. LEG 87/5/1 (Aug. 8, 2003), Annex 1, p. 8; 88th Sess., Agenda item 3, *Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, IMO Legal Committee, IMO Doc. LEG 88/3 (Feb. 13, 2004), Annex 1 art. 8*bis*, para. 2, n. 26; *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, *supra* note 221, n. 27.

233. 2005 Protocol, *supra* note 2, art. 8*bis*, para. 2.

234. France had made a proposal to this effect but it was not incorporated into the text. *See* IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Complements to the "Boarding" section, Submitted by France*, IMO Doc. LEG/SUA/WG.1/2/1 (June 30, 2004), art. 8*bis*, para. 2. *See also Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, *supra* note 221, n. 44 (a proposal that would have required the requesting party to hand over any evidence to the flag state); IMO Legal Committee, 90th Sess., Agenda item 15, *Report of the Legal Committee on the Work of its Ninetieth Session*, IMO Doc. LEG 90/15 (May 9, 2005), para. 66 (referring to a comparable proposal from India but was rejected, with some delegations stating it was already covered by the text of para. 5).

235. 2005 Protocol, *supra* note 2, art. 8*bis*, para. 2.

confirmation from the flag state as to the claim of nationality of the suspect vessel.[236]

2. Available Procedures for Permitting Ship-Boarding under Article 8*bis*

As set forth above, in authorizing a ship-boarding for the purposes of the 2005 Protocol, states parties may either consent on an *ad hoc* basis, consent implicitly if prior authorization is notified to the Secretary-General and no response to a request is forthcoming after four hours, or consent implicitly if prior authorization is notified to the Secretary General. This structure underlines that permission to board requires express flag state authorization and that tacit and advance authorizations to board are only optional.[237] The agreement reached in the 2005 Protocol in this regard stand in marked contrast to the consent system created under the United States bilateral ship-boarding agreements.[238]

When proceeding on an *ad hoc* basis, the requesting state must first await confirmation of nationality from the flag state before seeking authorization to board and take appropriate measures with respect to the suspect ship.[239] States parties must respond to requests pursuant to Article 8*bis* as expeditiously as possible.[240] Ambiguity as to the precise time constraint appears to have been preferred to a specific timeframe.[241] For example, a proposal to require a decision "as soon as possible and, wherever practicable, within four hours", consistent with the Council of Europe's implementation of the Vienna Convention, was not adopted.[242] France, in particular, proposed a regime to be put in place in the event

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236. *Id.,at* art. 8*bis*, para. 5(a) ("it shall request, in accordance with paragraphs 1 and 2, that the first Party shall confirm the claim of nationality").

237. *Review of SUA Convention and Protocol, Draft Amendments to the SUA Convention and Protocol, Submitted by the United States*, IMO Legal Committee, 89th Sess., Agenda item 4, IMO Doc. LEG 89/4/5 (Sep. 15, 2004), para. 12. *See also Report of the Legal Committee on the Work of its Eighty-Ninth Session*, *supra* note 5, para. 51 (supporting China's proposal that a provision specifically stating the need for express authorization be included in the SUA Protocol).

238. *See supra* Part V.B.

239. *See* 2005 Protocol, *supra* note 2, art. 8*bis*, para. 5(b).

240. Earlier drafts had referred to the need of states parties to respond expeditiously to a request confirming nationality as well as requests for authorization to take appropriate measures with regard to that ship. *Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2004), *supra* note 231, Annex 2, art. 8*bis*, para. 3. These separate requirements were subsequently replaced by the one general requirement in paragraph 1 of the article. *See Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, *supra* note 217, para. 9.

241. *See Report of the Legal Committee on the Work of its Eighty-Ninth Session*, *supra* note 5, para. 47 ("unless a clear time limit was established, legal uncertainty would arise as to what the requesting Party would be entitled to do in the event an answer was not received"). *See also* IMO, Review Working Group, 2nd Sess., Agenda item 2, *Review of the draft Protocol to the Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988 (1988 SUA Convention)* [hereinafter *Review of draft Protocol*], *Submitted by the Secretariat*, IMO Doc. LEG/SUA/WG.2/2/1 (Dec. 3, 2004), Annex, art. 8*bis*, para. 3(d), n. 23 ("[O]ne delegation proposed the insertion of a new subparagraph (d) that would set out consequences in the event of a request Party's failure to respond. This proposal was discussed but not accepted by the LEG 89 Formal Working Group.").

242. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA*

that no response came from the flag state, involving alerts to shipping in the area or decision among states parties.[243] However, "[s]everal delegations stated that the proposal was not needed, since the requesting State had a right to warn other Parties which could be implemented without any specific authorization being conferred by a provision in the protocol."[244]

China considered that the "generic requirement" to respond to a request as expeditiously as possible was sufficient and avoided unreasonable and impracticable difficulties in specifying a time limit.[245] In agreement with China's views, a majority of delegations considered that the imposition of a time limit was unnecessary as states would not ignore their obligations under the 1988 Convention, or that such a limit was "too constraining, impracticable (especially if different time zones were involved) and served no real purpose."[246] It was further feared that giving a warning to states parties if there was no response would permit arbitrary judgment on the part of the requesting state and may well be "intimidating and counterproductive to the aims of the Protocol."[247] Given these views, it is apparent that a lack of response was not intended to be construed as an authorization to board but that deference to flag state authority prevailed.

The flag state is given four options under the 2005 Protocol in deciding on how the boarding should proceed. It may authorize the boarding by the requesting state either on its own or with officials of the flag state, and, in either instance, subject the boarding to any conditions relating to responsibility for and the extent of measures to be taken.[248] Alternatively, the flag state may conduct the boarding and search the suspect vessel itself, or decline to authorize a boarding and

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Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States, *supra* note 221, n. 40 (referring to the Council of Europe 1995 *Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances*, which provides: "The flag State shall immediately acknowledge receipt of a request for authorization under Article 6, and shall communicate a decision thereon as soon as possible, and wherever practicable, within four hours of receipt of the request").

243. *See* IMO Legal Committee, 89th Sess., Agenda item 4, *Review of SUA Convention and Protocol: On 8*bis*(3): new paragraph (d), Submitted by France*, IMO Doc. LEG 89/WP.3 (Oct. 25, 2004), art. 8*bis*, para. 3(d); IMO, Review Working Group, 2nd Sess., Agenda item 2, *Review of Draft Protocol: New Article 8*bis*3(d), Submitted by France*, IMO Doc. LEG/SUA/WG.2/WP.1/Rev.2 (Feb. 2, 2005).

244. IMO, Review Working Group, 2nd Sess., Agenda item 4, *Draft Report of the Working Group*, IMO Doc. LEG/SUA/WG.2/WP.16/Add.1 (Feb. 4, 2005), para. 59. *See also Report of the Working Group*, Review Working Group, 2nd Sess., Agenda item 4, IMO Docs. LEG/SUA/WG.2/4 (Feb. 9, 2005) & LEG/SUA/WG.2/4/Corr.1 (Feb. 24, 2005), paras. 59-60.

245. IMO Legal Committee, 89th Sess., Agenda item 3, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by China*, IMO Doc. LEG 89/4/3 (Sep. 22, 2004), para. 5. *See also* 90th Sess., Agenda item 4, *Review of SUA Convention and Protocol: Comments and proposals, Submitted by China*, IMO Doc. LEG 90/4/6 (Mar. 18, 2005), para. 3 (advocating the deletion of France's proposed text on warning shipping if there is no response).

246. *Report of the Legal Committee on the Work of its Eighty-Ninth Session*, *supra* note 5, para. 48.

247. *Report of the Legal Committee on the Work of its Ninetieth Session*, *supra* note 234, para. 80.

248. *See* 2005 Protocol, *supra* note 2, art. 8*bis*, para. 5(c) and 7.

search.[249] What appears to be lacking in this provision is an obligation on the flag state to take measures against one of its vessels when there are reasonable grounds to suspect the involvement of that vessel in the commission of an offense under the 1988 Convention or 2005 Protocol. This possibility of flag state inaction would appear to be a regrettable gap in the 2005 Protocol's enforcement regime.

For *ad hoc* authorizations and boardings, the requesting state must receive express authorization from the flag state in order to proceed with boarding and other measures in respect of a suspect vessel. This preferred approach is obviously consistent with the traditional adherence to flag state authority in high seas areas.[250] In earlier formulations of Article 8*bis*, the United States had proposed that requesting states could imply authorization if a flag state did not respond to the request to board after four hours. The United States considered that a four-hour default rule was "essential to the prompt conduct of the boarding, to minimize delay of the suspect ship, and to the early release of the warship (or other ship clearly marked and identifiable as being on government service and authorized to that effect) to conduct its other missions."[251] Concerns about authorizing boarding through implicit consent during negotiations resulted in a proposal that states could opt out of such a situation by notifying the Secretary-General that boarding would only be authorized by express consent.[252] In this case, implicit consent remained the default rule with the onus placed on states to take steps to exclude such a possibility through notification to the Secretary-General. However, the "opt-out" formula proved unpopular during negotiations, as it was viewed as inconsistent with the right of a flag state to exercise jurisdiction.[253] Ultimately, the need for express consent to be afforded on an *ad hoc* basis prevailed and implied consent after four hours was re-configured as an "opt-in" clause.

This implicit authorization after a four-hour wait therefore constitutes an alternative avenue for states parties. Paragraph (d) of Article 8*bis* permits a boarding to proceed in these circumstances provided the flag state had previously notified the Secretary-General to this effect.[254] While this approach is more deferential to flag states, it does not overcome a number of the difficulties described by those opposing any form of implicit authorization. The four-hour time limit was criticized as impracticable due to the problem of time zones and public holidays.[255] In particular, the International Chamber of Shipping, the

249. *See id.*, art. 8*bis*, para. 5(c).

250. China insisted on unambiguous language in this regard. See *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by China*, *supra* note 244, para. 7.

251. *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2003), *supra* note 231, Annex 1, note xxx, p. 23.

252. *See Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2004), *supra* note 231, Annex 1, art. 8*bis*, para. 3.

253. *See* IMO Legal Committee, 88th Sess., Agenda item 13, *Report of the Legal Committee on the Work of its Eighty-Eighth Session*, IMO Doc. LEG 88/13 (May 18, 2004), para. 73.

254. *See Review of SUA Convention and Protocol, Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2004), *supra* note 231, Annex 1, art. 8*bis*.

255. *See Report of the Legal Committee on the Work of its Eighty-Eighth Session*, *supra* note 253,

International Shipping Federation and the International Confederation of Free Trade Unions opposed implicit authorization given concerns about the need for masters of vessels to have sufficient time to consult with ship owners as well as distinguishing between what would be a lawful tacit boarding and piracy or armed robbery at sea.[256] However, this last issue should not have proved a major concern given that boardings under the 2005 Protocol are to be conducted by law enforcement or other officials, and such persons and their ships would presumably be clearly marked and identified for these purposes.

A third alternative is that a flag state may notify the Secretary-General that a requesting state is "authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine is an offence set forth... has been, is being or is about to be committed."[257] This "opt-in" clause creates a power conferred by treaty to exercise the right of visit, and is comparable in this regard to the United States-United Kingdom Exchange of Notes in relation to drug trafficking.[258] Given that it is an "opt-in" provision, though, the emphasis remains on the freedom of choice afforded to flag states as to whether they will relinquish their authority for the purposes of preventing or responding to the offences addressed in the 1988 Convention and 2005 Protocol.

The preeminent power of the flag state is further affirmed by the fact that the notifications relating to either form of implicit authorization may be withdrawn at any time. During negotiations, although several delegations supported a suggestion that the text should reflect that a withdrawal would only become effective after a certain period of time,[259] no such time limit was included.[260] While withdrawal from a treaty may generally not take effect until a reasonable period of time passes,[261] it is not certain that the same rule would apply to the "opt in" notification. In any event, the possibility that the withdrawal of notification has immediate effect is not barred in view of the failure of states explicitly to exclude this possibility in the text of the agreement.

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para. 73.

256. *See* IMO Legal Committee, 88th Sess., Agenda item 3, *Review of SUA Convention and Protocol: Comments on draft article 3*bis*, Submitted by the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and the International Confederation of Free Trade Unions (ICFTU)*, IMO Doc. LEG 88/3/3 (Mar. 19, 2004), para. 4.

257. 2005 Protocol, *supra* note 2, art. 8*bis*, para. 5(e).

258. *See supra* notes 128–136 and accompanying text (discussing the Exchange of Notes).

259. *See* IMO, Review Working Group, 1st Sess., Agenda item 3, *Report of the Working Group*, IMO Doc. LEG/SUA/WG.1/3 (July 26, 2004), para. 80.

260. *See Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, *supra* note 224, Annex I, art. 8*bis*, para. 3(e), n. 41 (noting that no proposed text on the effective date of notification had been received and including a suggestion of an unspecified number of days). *See also Review of SUA Convention and Protocol: On* 8bis*(3): new paragraph (d), Submitted by France*, *supra* note 222, art. 8*bis*, para. 3(f) n. 5.

261. Article 56 of the Vienna Convention on the Law of Treaties anticipates a one-year notice period for the withdrawal from treaties. Vienna Convention on the Law of Treaties art. 56, May 23, 1969, 1155 U.N.T.S. 311.

B. Safeguards Required in Undertaking a Boarding

In addition to detailing the manner by which a state may board a foreign vessel, a number of safeguards are incorporated into Article 8*bis* to temper the manner by which the boarding may be conducted and to ensure consistency with international law standards.[262] In this regard, paragraph 10 sets forth duties imposed on the requesting state such as the protection of the persons on board, the safety and security of the ship and its cargo, and, not prejudicing the commercial or legal interests of the flag state.[263]

The conduct of the boarding must also be consistent with international law requirements relating to the use of force. At the outset of negotiations, it was proposed that any use of force in the course of undertaking a boarding of a suspect vessel was to be consistent with national law standards as well as the minimum reasonably necessary under the circumstances.[264] States subsequently objected to national law exclusively governing the boarding of a vessel, so it was amended to refer to boardings consistent with international law.[265] Further support was drawn from the formulation on the use of force in boardings included in the Fish Stocks Agreement.[266] Article 8*bis* provides that the use of force is to be avoided "except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions."[267] Requesting states are further required only to use the minimum degree of force that would be necessary and reasonable in the circumstances.[268]

If evidence of unlawful conduct in relation to the offenses under the 1988 Convention and 2005 Protocol is discovered as a result of the boarding, the flag

262. These provisions were primarily driven by the International Confederation of Free Trade Unions, which insisted on maintaining protection for seafarers in the SUA Protocol in a comparable manner to those afforded in the ISPS Code and SOLAS Convention, as well as being consistent with the high priority accorded to what was referred to as the human element in the work of the IMO. *See Review of SUA Convention and Protocol: Submitted by the International Confederation of Free Trade Unions (ICFTU)*, IMO Doc. LEG 87/5/2 (Sept. 11, 2003), paras. 4-6.

263. *Id.*, para. 10.

264. *See Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2002), *supra* note 9, Annex 1, p. 8.

265. *See Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States* (2003), *supra* note 231, Annex 1, note xxxv, pp. 23-24.

266. Article 22(1)(f) of that treaty reads: "The degree of force used shall not exceed that reasonably required in the circumstances" The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 22(1)(f), Dec. 4, 1995, 2167 U.N.T.S. 3. This approach was advocated by the United Nations as part of the discussions in the correspondence group. *See* IMO Legal Committee, 87th Session, Agenda Item 6, *Review of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf, Submitted by the International Confederation of Free Trade Unions*, IMO Doc. LEG 87/5/2 (Sept. 11, 2003), para. 12. *See also Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, *supra* note 217, para. 17.

267. 2005 Protocol, *supra* note 2, art. 8*bis*, para. 7.

268. *See id.*, art. 8*bis*, para. 9.

state is to be promptly informed.[269] The flag state may also authorize the detention of the ship, cargo and persons on board.[270] In these circumstances, the 2005 Protocol specifies that the flag state has the right to exercise jurisdiction, or that the flag state may consent to another state exercising jurisdiction if that state would have jurisdiction by virtue of Article 6 of the 2005 Protocol and 1988 Convention.[271] This formulation emphasizing the authority of the flag state reflects earlier drafts that explicitly referred to the primary right of the flag state to exercise jurisdiction.[272] As such, it would seem that the requesting state that conducts the boarding and uncovers unlawful conduct under the terms of Article 3, 3*bis*, 3*ter* and 3*quater* may not ultimately be authorized to proceed with the prosecution of the alleged offenders if a jurisdictional nexus under Article 6 does not exist.

In the event that a boarding is conducted and the grounds for such measures are unlawful or prove to be unfounded, the burden then falls to the requesting state to compensate for "any damage, harm or loss attributable to [that state] arising from measures taken pursuant to" Article 8*bis*.[273] The possible attribution of liability in these circumstances would tend to indicate that any decision to request authorization to board must in reality exceed the mere existence of a reasonable ground to suspect. However, a state conducting a boarding in this situation will not be liable if the ship boarded has committed an act justifying the suspicion in the first place.[274] This limitation is consistent with the requirements set out in Article 110 of UNCLOS.[275]

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269. *See id.*,art. 8*bis*, para. 6.

270. *See id.*

271. It was acknowledged during the course of negotiations that "while as a general rule, the flag State will normally remain in charge of the boarding operation and of the subsequent steps that might follow, including criminal prosecutions, there may be situations in which it would be more sensible to allow the intervening State – or a third State – to exercise its jurisdiction." *Report of the Legal Committee on the Work of its Eighty-Ninth Session*, *supra* note 5, para. 56.

272. *See Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by the United States*, *supra* note 217, para. 16. *See also* IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Comments on Annex 1 as circulated by e-mail by the Co-ordinator of the Correspondence Group, Submitted by Brazil*, IMO Doc. LEG/SUA/WG.1/2/2 (June 30, 2004), para. 10; *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Proposed revisions to the proposed Protocol to the SUA Convention from the LEG 88 SUA Work Group (Annex 1), Submitted by the United States*, *supra* note 221, n. 46.

273. Proposals to refer to compensation payable or to joint and several liability were not adopted. *See* IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Draft amendments to the SUA Convention and SUA Protocol, Comments on US delegation's proposed revisions to the proposed Protocol to the SUA Convention (Annex 1), Submitted by Brazil*, IMO Doc. LEG/SUA/WG.1/2/4 (July 9, 2004), para. 14; IMO, Review Working Group, 1st Sess., Agenda item 2, *Review of SUA Convention and Protocol: Suggested amendment to article 8*bis *8b (Safeguards), Submitted by Mexico*, IMO Doc. LEG/SUA/WG.1/2/8 (July 12, 2004).

274. *See* 2005 Protocol, *supra* note 2, art. 8*bis*, para. 10(b)(i).

275. *See* UNCLOS, *supra* note 21, art. 110(3).

C. Interrelationship of Boarding Provisions with Other Rules of International Law

During the course of negotiations, the Legal Committee of the IMO:

> recognized that the inclusion of boarding provisions constituted a significant departure from the fundamental principles of freedom of navigation on the high seas and exclusive jurisdiction of flag states over their vessels. It was accepted that the principle of flag State jurisdiction must be respected to the utmost extent, recognized in that a boarding by another State on the high seas could only take place in exceptional circumstances. Any exception must be precise, unambiguous and internationally accepted.[276]

There are several provisions within Article 8*bis* that recognize the existence of other regimes for the boarding of ships. For example, a paragraph was subsequently included to reflect the customary law rules enshrined in Article 110 of UNCLOS in relation to the right to board and inspect a vessel if the ship is without nationality or may be assimilated to a ship without nationality.[277] The 2005 Protocol is not intended to apply or limit boardings that are based on the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag state to take law enforcement or other action.[278] This latter exclusion allows for the possibility that a requesting state may reach agreement with the flag state not to follow the strict contours of Article 8*bis* of the 2005 Protocol but proceed on an alternative basis of consent.

Article 8*bis* is also accorded the character of being a framework for operations between states parties, as paragraph 13 anticipates that states parties "may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article."[279] In view of the increased scope of Article 3, and particularly the references to the transporting of nuclear, chemical and biological weapons, it is possible to interpret this provision as providing some allowance for the existence of the PSI. It further enables the United States to maintain its bilateral ship-boarding agreements without modification in view of the more flag-state-oriented provisions of the 2005 Protocol.

D. Conclusion

Article 8*bis* of the 2005 Protocol is an important development in the law of the sea, as it constitutes another power conferred by treaty for warships to exercise the right of visit in respect of foreign vessels on the high seas. The existence of this procedure coupled with the expanded range of offenses addressed by the 2005 Protocol will be a significant addition to counter-terrorism efforts, provided it

276. *Report of the Legal Committee on the Work of its Eighty-Eighth Session*, *supra* note 252, para. 66.

277. *See Draft amendments to the SUA Convention and SUA Protocol, Submitted by the United States*, *supra* note 217, Annex 1, art. 8*bis*, para. 16, p. 13.

278. *See* 2005 Protocol, *supra* note 2, art. 8*bis*, para. 11.

279. *Id.*, art. 8*bis*, para. 13.

attracts a large enough cohort of states parties.[280] The possibility exists that the United States may provide incentives to states parties to agree to the "opt-in" consent methods so as to strengthen the position of the state wishing to board the foreign vessel.[281]

The limits of the 2005 Protocol, notably in terms of retaining the emphasis of express consent of a flag state for boarding, the risk of lost opportunity due to flag state delay in authorization and the possibility of obstructive conditions in conducting a boarding, may undercut its utility, even if it does gain sufficient adherence among relevant states. These weaknesses exist because of what appears to amount to unquestioning deference being accorded to the traditional paradigm. If the common interest in meeting security needs is not being met, it is worth asking whether the balance of inclusive and exclusive interests is now inadequately conceived and examine to what extent a paradigm shift is necessary.

VII. THE NEED FOR A PARADIGM SHIFT?

The difficulty that exists for states in endeavoring to improve their maritime security arises when those measures may be viewed as encroaching on the principle of *mare liberum*. How is it possible for a state to make a claim supporting an exclusive interest in security when it is being countered by the almost reflexive invocation of inclusive interests in the freedom of the high seas? As Lehrman remarks:

> Under the *mare liberum* principle, the interdiction of a flag vessel of a foreign state is generally considered to be the prerogative of the flag state in question, not of third-party states patrolling the high seas. Thus, freedom of the seas is in tension with the perceived need of third-party states to exercise their power over interdiction.[282]

There appear to be two perspectives on how it may be possible to resolve this tension. In the first instance, there may be greater acceptance of the idea that terrorist threats require another exception to the traditional paradigm. Another basis to exercise the right of visit will be accorded to warships in dealing with foreign vessels on the high seas, provided that the right is exercised in a manner that is sufficiently respectful of the freedoms of the high seas and flag state control. To this end, the scope of the right of visit for this purpose will be carefully defined and safeguards for the flag state put in place. The 2005 Protocol and the bilateral ship-boarding agreements initiated by the United States fit within this mold

280. As of December 31, 2007, there were only two contracting parties to the 2005 Protocol. See IMO, *Summary of Conventions as at 31 December 2007,available at* http://www.imo.org/Conventions/mainframe.asp?topic_id=247.

281. *See* International Law Programme Discussion Group at Chatham House, *The Proliferation Security Initiative: Is It Legal? Are We More Secure?* (Feb. 24, 2005), *at* http://www.chathamhouse.org.uk/publications/papers/download/-/id/278/file/3914_ilp250205.pdf. (reporting on suggestion that the United States may persuade states to "opt-in" in a similar manner to the way that the United States has convinced states parties to the Statute of the International Criminal Court to conclude treaties as per Article 98 of the Court's Statute so as to exclude the jurisdiction of the Court over US nationals).

282. Lehrman, *supra* note 49, at 229.

(although the latter are slightly less deferential to flag state control than is the former). This approach represents a gradual accretion in the law, consistent with past claims over ocean space that allowed for more instances of exclusive control for specific interests. Such a course is understandable given that the significance of the shipping industry in the global economy requires the maintenance of commercial interests in developing procedures and legal standards to counter the current security threats.[283]

It may also be the case that the traditional paradigm is so entrenched in the jurisprudence of the law of the sea and in the minds of the relevant policy-makers that this shift is all that may be expected. Regardless of the shortcomings that may still prevail in defining the contours of this new exception, just as deficiencies may be identified in the definition of piracy and the scope of powers to deal with the slave trade, the outcome produced is the best compromise given other commercial, military, social and scientific interests at stake. It is the common interest in maintaining *mare liberum* and flag state authority that prevails.

Another perspective on resolving the tension between the freedom of the high seas and states seeking greater powers over foreign vessels to promote their perceived security needs involves recognizing that these latter claims are inclusive in nature, rather than exclusive. That is, all states share a mutual interest in preventing and suppressing terrorist acts against international shipping. President Jesus, writing extra-judicially, has confirmed this view:

> The possible acceptance of jurisdiction of any state party to police ships suspected of being involved with terrorist acts on the high seas areas of the ocean would be another encroachment on the state's sovereignty or exclusive jurisdiction over ships flying their flag. *However, it would be a legitimate encroachment to the extent that it would be done for a good purpose, benefiting all states.*[284]

President Jesus makes this point in relation to the negotiations that were being undertaken on the 2005 Protocol and thus arguably approaches the issue from the first perspective. But the point that all states will benefit from the policing of the high seas for the purposes of preventing terrorist attacks is valid for both perspectives; the key question is what consequence should be drawn from this accepted benefit. Is it simply a matter of justifying a new exception, or is it necessary to accept that encroachments on flag state control for the purposes of promoting maritime security are actually concomitant with the freedoms of the high seas in light of the inclusive interest in protecting international shipping from terrorist attack?

The common interest here is in formulating a perspective on *mare liberum* that reduces, even if only slightly, the preeminent position of flag state control

283. For example, the 2003 report of the UN Secretary-General noted that "[a] balance must also be sought between tightening security measures and maintaining the efficient flow of international trade". *Oceans and the Law of the Sea: Report of the Secretary-General*, UN GAOR, 58th Sess., UN Doc. A/RES/58/65 (2003) at 33.

284. Jesus, *supra* note 60, at 395 (emphasis added).

while still recognizing the ongoing viability of maintaining the freedoms of the high seas. Thus the inclusive interests in reserving the high seas as maritime areas available to all users is not jeopardized, rather our paradigm shift comes in acknowledging that inclusive interests require greater regulation and even intervention in flag state control. The weight accorded to the exclusive claims of the flag state needs to be reduced in seeking to balance inclusivity and exclusivity in our common interest equation.

The need to lessen flag state authority for issues related to maritime security is particularly evident given the phenomenon of flags of convenience. The use of flags of convenience involves ship owners changing the nationality or registry of a ship to a different state as necessary, often as a means of avoiding closer regulation and/or for financial imperatives. As Garmon explains:

> Unless the flag state is a signatory to a convention directed at combating maritime violence and terrorism, the flag state is not obliged to prosecute such crimes. Moreover, flag states, offering a haven of convenience to vessel owners, do not have a vested interest in imposing stricter standards against accused vessels. To impose stricter standards against vessel owners would encourage vessel owners to seek more convenient registries. Thus, so long as flag states retain sole discretion regarding enforcement against maritime violence and terrorism, little can be done to combat increasing trends.[285]

The consequence of this paradigm shift, whereby inclusive interests in maritime security require less emphasis on flag state authority, could have been brought to bear during the negotiations of the 2005 Protocol. With less deference accorded to flag state control, states may have been willing to create a basis of consent for ship-boarding by virtue of the treaty (comparable to the United States and United Kingdom's Exchange of Notes to curb drug trafficking). Even if this consent would not be accorded, the "opt-out" form of tacit consent may have been preferable to the "opt-in" consent procedure included in the agreement. Less weight on exclusive flag state control may have further resulted in the removal of a clause permitting the flag state to impose conditions on the boarding, additional to the safeguards already included in the instrument, or may have at least anticipated mutually agreed conditions. Other possible adjustments to the 2005 Protocol if there had been less deference to flag state control would have anticipated enforcement jurisdiction being exercised by the boarding state consequent on the common interest of all states parties in preventing and suppressing these crimes, as well as a reconsideration of the range of safeguards included for flag states specifically.

A paradigm shift does not need to be revolutionary to instigate change. It would be enough for a different understanding of what falls within the common interest of states to influence what weight should be accorded to inclusive interests and to exclusive claims in achieving the optimal balance. Even a small change in

285. Garmon, *supra* note 70, 268–69 (footnotes omitted).

emphasis may have produced a different, and arguably more effective, legal regime for the prevention and suppression of maritime terrorism.

THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES AND THE REGIONAL USE OF FORCE

Peter A. Jenkins[†]

I. INTRODUCTION

The legality of the use of force by regional organizations for humanitarian reasons, otherwise known as humanitarian intervention, is a hotly contested issue. The United Nations Charter specifically prohibits the use of force except in limited circumstances, which do not literally include humanitarian intervention.[1] However, regional organizations have consistently cited humanitarian intervention as the basis for using force within sovereign states without the consent of the United Nations Security Council or, sometimes, the consent of the government of the state within which force is used.[2] The consistent practice of these organizations has resulted in a variety of legal justifications for the use of force, ranging from creative interpretations of the Charter to notions of implied consent from the Security Council.[3]

The Economic Community of West African States ("ECOWAS" or "the Community"), a passive economic conglomerate of African nation states, and the Economic Community of West African States Cease-Fire Monitoring Group ("ECOMOG"), the paramilitary peacekeeping wing of ECOWAS, maintain a significant role in the development of legal justifications for regional use of force. Although the policy and actions of African nations has not typically been given much deference in the international legal arena, ECOWAS's actions in Liberia and Sierra Leone at a minimum establish consistent practice which can be used as precedent for other regional organizations. However, ECOWAS's actions have

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1. U.N. Charter art. 2, para. 4; U.N. Charter art. 51.

2. See, for example, the NATO intervention within the former Yugoslavia; OAS intervention; ECOWAS intervention within Liberia.

3. *See* THOMAS M. FRANCK, RECOURSE TO FORCE 139 (2002) (describing the "law of mitigation" as well as the alternative of reinterpretation).

arguably begun the process of creating a sufficient legal basis for reinterpreting the Charter to include implicit authorization under Article 53 of the U.N. Charter.[4]

The purpose of this paper is to analyze the validity of the legal justifications, both official and theoretical, for ECOWAS's actions in Liberia and Sierra Leone, as well as to assess the practical impact of these justifications for future use of force, and to establish criteria for justification of humanitarian intervention with regional action particularly in mind.

Human rights are an area of increasing concern to the international community, and the repeated violation of human rights in incidents such as Liberia, Somalia, Kosovo, and Darfur requires that the legal criteria for forceful humanitarian intervention be substantially established. However, the criteria should not only be aimed at protecting human rights, but also avoiding possible misuse of the doctrine by states with alternative motives.[5]

II. BACKGROUND

An adequate understanding of the legal issues involved requires a proper context of both the history and original intentions of ECOWAS as well as the development of the use of force within the international law over time, in particular the role of the U.N. Charter and various theoretical bases for force. Furthermore, although not necessary, a moral understanding of humanitarian intervention allows for greater perspective in analyzing the issues and may provide a greater insight into the need for sound international law regarding humanitarian intervention.

A. Definition of Humanitarian Intervention

For this analysis, humanitarian intervention will be defined as an individual state or collection of states interfering in the affairs of a foreign state through use or presence of armed forces to prevent the violation of human rights. This definition incorporates actions for the purposes of protecting a state's own citizens abroad and protecting a foreign state's citizens from violations. Furthermore, the term "human rights" includes any of the provisions of the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the Genocide Convention.[6]

B. History of ECOWAS

On May 28, 1975, fifteen West African countries signed the Treaty of Lagos establishing ECOWAS.[7] The original agreement was signed by Benin (formerly

4. *Id.*

5. For example, the Ugandan intervention in Angola was possibly motivated by long-standing hostilities towards one another.

6. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; Universal Declaration of Human Rights, G.A. Res. 217A(III) (1948), *available at* http://www.unhchr.ch/udhr/lang/eng.htm; Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III) (1948), 78 U.N.T.S. 277, *available at* http://www.hrweb.org/legal/genocide.html.

7. Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 1010 U.N.T.S. 17 [hereinafter Treaty of Lagos] (founding treaty establishing ECOWAS).

known as Dahomey), Burkina Faso (formerly known as Upper Volta), Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.[8] Cape Verde joined the community in 1976 as the 16th member and Mauritania left it at the end of 1999, although at the time of the interventions all 16 members were still part of ECOWAS.[9]

The original intention of the Community comes from Article 2 of the Treaty of Lagos. The stated purposes are "promot[ing] co-operation and development in all fields of economic activity" as well as increasing the standard of living, maintaining economic stability, and fostering closer relations between its member states.[10] The Treaty established four main institutions including the Authority of Heads of State and Government ("Authority"), which controls the executive functions of the Community, and the Executive Secretariat, which controls the daily operations.[11] The bulk of the Treaty at Lagos deals with trade, tax, customs, and monetary regulation in addition to future requirements of "harmonization" and co-operation between member states.[12] Enforcement of the provisions of the Treaty of Lagos is handled by the Tribunal of the Community, which can only settle disputes between treaty parties, [13] The Authority, which can suspend members from the Community,[14] and the Council of Ministers, which can impose unspecified measures to remedy disparity between member states.[15] Notably, a military wing was not originally incorporated into the Treaty of Lagos, although Article 4 does allow for creation of special commissions in the future.[16]

ECOWAS soon realized the importance of military peace within the Community. Three years after its inception, the Community issued the Protocol on Non-Aggression which stated that it "cannot attain its objectives save in an atmosphere of peace and harmonious understanding among the Member States."[17] The protocol reaffirms the prohibition on force in the U.N. Charter and extends the prohibition to acts of "subversion, hostility, or aggression" against the territory or political structure of member states.[18] The primary intentions of the protocol were

8. *Id.*.

9. S.K.B. ASANTE, THE POLITICAL ECONOMY OF REGIONALISM IN AFRICA 1 (Praeger Publishers 1986).

10. Treaty of Lagos, *supra* note 7, at art. 2.

11. *Id.* at art. 4.

12. *Id.* at arts. 30, 34-36.

13. *Id.* at art. 11 (Article 11 also allows the Tribunal to "ensure the observance of law and justice in the interpretation of the provisions").

14. *Id.* at art. 54 (Article 54 mentions suspension from participation in ECOWAS activities in response to non-payment of required contributions).

15. *Id.* at art. 32 (Article 32 does not specify the types of measures to be used, only that the measures should be "designed to promote the industrial development of Member States").

16. *Id.* at art. 4(1)(e) (enabling the Authority to create new commissions "as it deems necessary").

17. Protocol on Non-Aggression pmbl., Apr. 22, 1978, 1690 U.N.T.S. 39, *available at* http://www.iss.co.za/af/regorg/unity_to_union/pdfs/ecowas/14ProtNonAggre.pdf.

18. *Id.* at art. 2 (Article 2 augments the reaffirmation of the U.N. Charter located in the preamble).

to require the use of peaceful means of dispute resolution[19] and to prevent foreigners from using a member state as a base for subverting other states.[20]

The Protocol on Non-Aggression was supplemented in 1981 by the Protocol Relating to Mutual Assistance of Defence ("Mutual Defence Protocol"). The Mutual Defence Protocol "firmly resolve[d]" to safeguard the sovereignty of member states from foreign intervention.[21] Also, an element of collective defense was added to ECOWAS by requiring mutual assistance against any armed threat and defining that a threat against one member state constituted a threat against the whole Community.[22] Furthermore, the protocol established the framework for collective intervention by creating the Allied Armed Forces of the Community ("AAFC"), a military force comprised of national units contributed by member states,[23] and requiring action in two circumstances: failure of peaceful means of settlement required by the Protocol on Non-Aggression; or "[i]n case of internal armed conflict within any Member State engineered and supported actively from outside likely to endanger the security and peace in the entire Community."[24] Although the plain language of the protocol appears to authorize intervention in internal conflicts such as civil wars that are externally supported, this type of intervention is tempered by the need for a legitimate territorial defense of a member state as well as the extension of the conflict outside of "purely internal" bounds.[25]

The final step towards the use of military force by ECOWAS was the creation of the Community Standing Mediation Committee ("SMC") in May of 1990 in reaction to the crisis in Liberia. The SMC was comprised of the Chairman of the Authority (represented by Captain Blaise Compaore of Gambia) with Ghana, Mali, Nigeria, and Togo as elected representatives.[26] The Authority formed the SMC to initiate mediation procedures for countries in conflict, but by the inception of the intervention in Liberia the SMC acted on behalf of the Authority in initiating intervention under the Mutual Defence Protocol.[27]

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19. *Id.* at art. 5.

20. *Id.* at art. 4.

21. Protocol Relating to Mutual Assistance on Defence pmbl., May 29, 1981, 1690 U.N.T.S. 51, *available at* http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/13ProtMutualDefAss.pdf [hereinafter Mutual Defence Protocol].

22. *Id.* at arts. 2-3.

23. *Id.* at art. 13 (limited by the occurrence of "any armed intervention" in Article 13).

24. *Id.* at art. 4 (subject to a prior decision by the Authority of Heads of State and Government after collaborating with the member state involved).

25. *Id.* at arts. 15, 18 (Article 15 requires the territorial defense while Article 18 prohibits intervention into internal conflicts).

26. ECOWAS, Authority Decision A/DEC. 9/5/90, 21 O.J. ECOWAS Spec. Supp. 5 (1992), [hereinafter Founding SMC Decision], *reprinted in* UNIVERSITY OF CAMBRIDGE RESEARCH CENTRE FOR INTERNATIONAL LAW, REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 38-39 (M. Weller ed., 1994) [hereinafter REGIONAL PEACE-KEEPING RESEARCH]; ADEKEYE ADEBAJO, BUILDING PEACE IN WEST AFRICA 51 (2002).

27. *See* ECOWAS, SMC Decision A/DEC. 1/8/90, On the Cease-Fire and Establishment of an ECOWAS Cease-Fire Monitoring Group for Liberia, , 21 O.J. ECOWAS Spec. Supp. 6 (1992) [hereinafter Founding ECOMOG Decision], *reprinted in* REGIONAL PEACE-KEEPING RESEARCH, *supra*

C. Brief History of the Use of Force

1. Force Prior to the U.N. Charter

The justifications for the use of force were relatively static up until the First World War, but the extent of that conflict and its impact on world opinion regarding force acted as a catalyst for change which resulted in initial yet unsuccessful measures that were solidified by the reaction to the Second World War. Historically, the main use of force was war and the primary justification was the Just or Holy War, which utilized divine will as the objective measurement for the validity of war.[28] The main flaw with this doctrine was the fact that both states to a conflict could invoke divine will as justification for their own position.[29]

Gradually, the doctrine of positivism displaced the Just War with the notion of sovereignty, which was later "codified" by the Treaty of Westphalia.[30] Sovereignty is the current fundamental basis for international law which entails three significant rights: the government of a state maintains sole authority over the state, every state is juridically equivalent, and no higher law binds states without their consent.[31] Furthermore, sovereignty included a *competence de guerre*, a right to war, which was wholly separate from any valid justification. Consequently, the fact that states could go to war became the justification for actually going to war, regardless of the moral or ethical bases.[32]

Two other doctrines that accompanied the right to war were reprisals and self-defense. Both doctrines are forms of force on a lesser scale than war, and both doctrines are limited by necessity and proportionality.[33] Reprisals are reactions to violations of international law after a demand for redress has gone unmet, and is embodied within the *Naulilaa* decision against Germany.[34] Self-defense was classically described in the *Caroline* case by then Secretary of State Daniel Webster as the acceptable use of force in the absence of a prior violation of law as long as the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[35]

The mass casualties and the broad geographic scope of the First World War altered the common perceptions on force and led to initial measures to prevent its use. The League of Nations was formed and implemented a form of dispute resolution designed to impose a "cooling off" period on states in order to prevent

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note 26, at 67-69; Mutual Defence Protocol, *supra* note 21, at arts. 2-3.

28. *See* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 11-12 (1993).

29. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 778-79 (4th ed. 1997) (referring to the drawback as the "paradox of wars between Christian states").

30. AREND, *supra* note 28, at 15-16.

31. *Id.* at 16.

32. *See id.* at 17.

33. *See id.* at 17-18.

34. *Id.* at 17. *See also* Naulilaa (Germany v. Port.), 2 R.I.A.A. 1012, 1019 (1928), *reprinted in* L. C. GREEN, INTERNATIONAL LAW THROUGH THE CASES 679, 680 (4th ed. 1978).

35. AREND, *supra* note 28, at 18. *See also* JOHN BASSETT MOORE, 2 DIGEST OF INTERNATIONAL LAW 412 (1906) (discussing the *Caroline* incident between Canada and the United States).

emotional reactions.[36] However, the League only imposed two procedural restrictions on the use of force, namely that states must wait three months before acting and that force was prohibited if a state complied with all arbitral decisions.[37]

The other major advance after the First World War was the Kellogg-Briand Pact which took the significant steps of condemning the recourse to war and renouncing war as an "instrument of national policy," which refuted the longstanding notion of *competence de guerre*.[38] The Pact gained broad acceptance as binding customary law, but it also failed to realize any significant enforcement applications and only addressed the use of war, which left open the option for measures short of war.[39] However, the Pact had a significant impact on *jus ad bellum* and other reasons for force used in future incidents.[40] Ultimately, neither the League of Nations nor the Kellogg-Briand Pact yielded the desired result, as the Second World War broke out within a decade of these advances.

2. Legal Justifications for Intervention under the U.N. Charter

At the conclusion of the Second World War, a delegation of forty-nine states met in San Francisco to draft the Charter of the United Nations. The primary purposes of the Charter were to establish international norms regulating state behavior and create an organization to ensure compliance with the Charter as well as maintain peace among the states.[41] The legally binding nature of the Charter results both from treaty law and customary law,[42] and although the application of the latter is a matter of debate, the practical significance is inconsequential to this analysis because every member of ECOWAS is a member of the United Nations.[43]

The imposed norm regarding the use of force, however, was emphatic – any "threat or use of force" against the territorial or political integrity of a state was prohibited except in self-defense or in reaction to a "threat to the peace, breach of the peace, or act of aggression."[44] Essentially, the Charter established a two-tier system on the use of force: the upper being a structure for an ideal world in which no state would initiate conflict; and the lower allowing for individual or collective response by states in the event the U.N. is unable or unwilling to act.[45] The latter scenario significantly affects the justifications for humanitarian intervention when combined with the express authorization of regional organizations to act "consistent[ly] with the Purposes" of the Charter.[46]

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36. *See* AREND, *supra* note 28, at 19-20; League of Nations Covenant art. 12.

37. League of Nations Covenant arts. 12, 15.

38. Kellogg-Briand Pact art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

39. *See* AREND, *supra* note 28, at 23-24.

40. *Id.* at 24.

41. U.N. Charter pmbl.

42. See AREND, *supra* note 28, at 30 (describing the broad acceptance of the U.N. Charter as imposing customary law subject to state practice and *opinio juris*, the intention to be legally bound).

43. U.N. List of Member States, http://www.un.org/Overview/unmember.html.

44. U.N. Charter arts. 2, 39, 51.

45. FRANCK, *supra* note 3, at 3.

46. U.N. Charter art. 52(1).

The lower tier is comprised of the Article 51 and Article 106 exceptions to the prohibition on force and it gives rise to problems of interpretation.[47] Initial ambiguity resulted from the Article 2(4) phrase "against the territorial integrity or political independence of any state"[48] as to whether it was a simple rephrasing of "all use of force is prohibited" or whether there are acceptable uses of force which do not affect the territorial integrity of the state. A rather larger and more significant ambiguity, however, lies in the meaning of "armed attack," which is the essential criteria for invocation of the Article 51 self-defense exception to the prohibition on force.[49] The ambiguity in "armed attack" has given rise to a variety of legal justifications for force based on creative interpretations of Article 51, including protection of citizens abroad and humanitarian intervention.[50]

Protection of citizens abroad has a sound legal foundation but is subject to substantial criticism.[51] The principle is based upon an obligation of each state to protect its own citizens and the theory that state sovereignty is trumped by the obligation in certain circumstances, such as proportionately controlled action by a state with genuinely protective motives responding to a serious threat to its citizens.[52] However, use of the principle is tempered by the criticism that it allows strong states to disrupt the affairs of weaker states with relative impunity.[53] Consequently, states are hesitant to use the protection principle as a justification for humanitarian use of force.

Humanitarian intervention, on the other hand, is absent a historical legal basis but enjoys the benefit of rising popularity among states and regional organizations as enforcement of justice. Two typical rationales put forth as bases for humanitarian intervention are: specific violations of human rights are also violations of international treaty agreements which warrant "self-help" by other parties to the agreement;[54] or that circumstances that accompany gross human rights violations, particularly the mass flow of refugees across state borders,

47. *See* FRANCK, *supra* note 3, at 3 (identifying the composition of the "lower tier"); *see also* AREND, *supra* note 28, at 35 (pointing out the interpretation problems). Article 106 analysis is not considered in this analysis because it relates specifically to U.N. Security Council members, none of which are parties to ECOWAS.

48. U.N. Charter art. 2(4); *see also* AREND, *supra* note 28, at 36 (theorizing that it is possible to use force within another state without affecting its territorial integrity).

49. *See* AREND, *supra* note 28, at 36; U.N. Charter art. 51.

50. FRANCK, *supra* note 3, at 52 (including additional justifications of terrorism, ideological subversion, and anticipatory defense, which are not considered in this analysis). For the purposes of this analysis the term "humanitarian intervention" refers solely to saving another state's citizens, as it can be confusing to refer to action on behalf of a state's own citizens as humanitarian intervention, although both are intended to rescue people.

51. *See id.* at 76-77 (terming the use of the doctrine "problematic").

52. *Id.* at 96 (classifying the protection of citizens as ranging from "technically illegal" but mitigated by circumstances to an adaptive concept of self-defense depending upon the breadth of interpretation).

53. *Id.* at 76-77.

54. *See id.* at 135 (pointing out the limitation that the violations of human rights must be specifically expressed in agreements such as the Genocide Convention or the International Covenant on Civil and Political Rights).

constitute a threat to the peace which warrants unilateral or collective response in the absence of U.N. action.[55] Furthermore, renowned legal scholar Professor Ved P. Nanda has developed five criteria for establishing the validity of humanitarian intervention:

> (1) [T]he necessity criterion, whether there was genocide or gross, persistent, and systematic violations of basic human rights;
>
> (2) the proportionality criterion, the duration and propriety of the force applied;
>
> (3) the purpose criterion, whether the intervention was motivated by humanitarian consideration, self-interest, or mixed motivations;
>
> (4) whether the action was collective or unilateral; and
>
> (5) whether the intervention maximized the best outcome.[56]

The principles of citizen protection and humanitarian intervention compose the primary legal justifications traditionally cited for use of force involving humanitarian goals. However, there is a significant obstacle to intervention located in Article 2(7), which prohibits intervention into "matters which are essentially within the domestic jurisdiction of any state."[57] The loophole in this principle is that it "shall not prejudice the application of enforcement measures under Chapter VII."[58] Consequently, states wishing to act can put forth two arguments to counter Article 2(7). A state may concede that 2(7) does apply and then invoke Article 51 or some other Chapter VII article. Alternatively, a state may argue that 2(7) does not apply because the violations of human rights are on a scale which precludes the situation from being "essentially within" the failing state.[59]

Another limitation on regional humanitarian intervention is the need for Security Council consent before using force in an "enforcement action."[60] At least one legal scholar, Professor John Moore, has argued that regional intervention into internal conflicts at the request of the prevailing government does not rise to the level of an enforcement action because the force is not directed against any particular government.[61] However, this notion is contrary to the well-founded principle of self-determination, which mandates that the people of a state should be allowed to determine their own government, even forcefully if necessary.[62] A

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55. *See* S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991) (stating the flow of refugees across borders "threaten[s] international peace and security in the region").

56. Ved P. Nanda, *Tragedies In Somalia, Yugoslavia, Haiti, Rwanda and Liberia - Revisiting the Validity of Humanitarian Intervention Under International Law- Part II*, 26 DENV. J. INT'L L & POL'Y 827, 827-28 (1998).

57. U.N. Charter art. 2(7).

58. *Id.*

59. *See* FRANCK, *supra* note 3, at 41 (textually the action is still prohibited, but practically force is acceptable when civil conflict "exceeds certain levels of virulence").

60. U.N. Charter art. 53(1).

61. AREND, *supra* note 28, at 63.

62. *Id.* at 40 (noting that aiding self-determination is sometimes used as a justification for force,

second, albeit tenuous, method of satisfying Article 53 would be through the General Assembly and the powers granted by the Uniting for Peace Resolution, which allowed the General Assembly to make recommendations on the presence of a threat or breach of the peace in the event the Security Council is unable to act due to political veto constraints.[63] Arguably, if the Security Council is deadlocked, the General Assembly could be used as a substitute authority to grant consent for regional action based on the Uniting for Peace Resolution.[64]

In conclusion, the optimal method to approaching humanitarian intervention is by treating the principle as textually illegal but increasingly acceptable as a compromise between peace and justice, whose validity depends upon the circumstances.[65] The moral justifications for humanitarian intervention also bolster the "justice" argument, which was a concern for the original drafters of the Charter.

D. Moral Justification for Humanitarian Intervention

The strongest argument establishing a connection between morality and law, particularly in the areas of human rights and use of force, is that the law regarding these areas cannot be invoked until a sufficient moral argument has been established.[66] Accordingly, a variety of approaches have arisen to establish the moral basis, including policy and natural rights arguments. The policy argument is best described by the New Haven approach as written by Professor Myres S. McDougal.[67] This approach includes clarification of general community goals and description of past trends to or away from realization of those goals.[68] The New Haven approach is quite applicable to the area of human rights, because the documents described *supra* in note 6 clearly evidence the "community goal" of preservation of human rights.[69] Conversely, the regard for this goal is somewhat diminished when juxtaposed with the fact that the U.N. Charter favors peace over justice in its actual text.

However, an analysis of past trends restores the argument. At the time of drafting, the international community was recovering from an extended period of violent unrest. Logically, the states' primary concern was peace, but as peace has

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i.e. helping the rebels).

63. *See* G.A. Res. 377 (V), U.N. GAOR, 5th Sess., 302nd Plen. Mtg., , A/RES/377(V) (Nov. 3, 1950).

64. *See* FRANCK, *supra* note 3, at 35 (describing the understanding that the resolution could "empower the Assembly to deploy military force").

65. *Id.* at 138-139.

66. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 12-13 (2d ed. 1997) (stating that "no 'purposive' interpretation of article 2(4) will be convincing or indeed possible" without the existence of a moral right).

67. MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AND INTERNATIONAL LAW OF HUMAN DIGNITY 367-68 (1980).

68. *Id.* at 423-24 (additional criteria include assessment of past conditions, projection of future developments, and evaluation of alternatives).

69. Compare to terrorism and the old saying, "One man's terrorist is another man's freedom fighter." Adam Brown, *It's Not Power That Corrupts But Fear*, SKY NEWS (Sept. 25, 2007), http://news.sky.com/skynews/article/0,,30000-1285561,00.html).

become a sustained norm in the international community, a trend towards recognition of human rights justice over peace has emerged. The interpretation of the law should adjust accordingly.

III. INTERVENTIONS

A. Liberia (1990)

ECOWAS's actions in Liberia are the most important to the legal discussion of regional humanitarian intervention. Not only was the use of force in Liberia the first of its kind by sub-regional "economic community," but also the lack of initial U.N. authorization and the subsequent U.N. response provide significant precedent for future interventions by humanitarian-motivated regional organizations.

1. Action Taken

The stage was set for a civil war in Liberia when Samuel Doe, an ethnic Krahn, stole elections in 1985 and subsequently engaged in brutal repression of both political opposition and independent activity.[70] The inevitable civil war broke out on December 24, 1989, when the National Patriotic Front of Liberia ("NPFL"), led by a Liberian ex-patriot named Charles Taylor, invaded Liberia from the Ivory Coast. The Armed Forces of Liberia ("AFL") responded by conducting a bloody counterinsurgency campaign which included indiscriminate killing, raping, burning, and looting. The NPFL also engaged in egregious acts by targeting the Krahn and Mandingo ethnic groups as suspected supporters of Doe's government. The violence both forced refugees, numbering in the hundreds of thousands, to flee to neighboring states and trapped hundreds of foreign state citizens in the Liberian capital of Monrovia.[71] Mediation attempts by the Liberian Council of Churches failed and a second rebel fraction broke away from the NPFL to form the Independent National Patriotic Front of Liberia ("INPFL"), headed by Prince Yomie Johnson.[72] The NPFL had reached Monrovia by summer 1990 and the atrocities by both sides had reached substantial levels when President Doe requested aid from both the United States and ECOWAS.[73]

The United States refused broad intervention, despite its historical ties to Liberia, calling the civil war a "Liberian responsibility."[74] The Standing Mediation Committee of ECOWAS, on the other hand, invoked the Mutual Defence Protocol in passing a resolution calling for a cease-fire and establishing a military force monitoring group (ECOMOG) comprised of national troops from

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70. *Liberia Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights*, AFRICA WATCH (Human Rts. Watch,), June 1993, at 5-6.

71. *Id.* at 6-7 (160,000 refugees fled within a month of the attack, which escalated to over 700,000 constituting one third of Liberia's population).

72. ABIODUN ALAO, THE BURDEN OF COLLECTIVE GOODWILL 36 (1998).

73. REGIONAL PEACE-KEEPING RESEARCH, *supra* note 26, at xxi.

74. Hearing on U.S. Policy and the Crisis in Liberia before the Subcomm. on Africa of the H. Comm. on Foreign Affairs, 101st Cong. (1991) (statement of Herman J. Cohen, Assistant Secretary of State), *reprinted in* REGIONAL PEACE-KEEPING RESEARCH, *supra* note 26, at 43, 46. The U.S. did intervene in Monrovia to extract approximately 1,000 foreign nationals, but insisted it was not intervening in the Liberian conflict. AREND, *supra* note 28, at 102-103.

Gambia, Ghana, Guinea, Nigeria, and Sierra Leone (with the majority coming from Nigeria).[75] ECOMOG entered Liberia in August 1990 without any external authorization except a plea from Doe, whose legitimacy was questionable given that Taylor's NPFL controlled all of the territory outside of Monrovia at the time.[76] The mandate of the intervention was to install and protect an interim government until free elections could be held.[77]

The initial intervention was a success. The bloody conflict in Monrovia was stopped, the Interim Government of National Unity ("IGNU") was installed, and a cease-fire was agreed to by all factions by November 1990.[78] An uneasy peace was in place and diplomatic relations resulted in the Yamoussoukro IV agreement to disarm and encamp all soldiers, although Taylor remained openly hostile to ECOMOG and its Nigerian influence.[79] Significant steps towards peace were made in early 1992, including the formation of an ad hoc Supreme Court, the opening of the University of Liberia, and the selection of an Interim Elections Commission in preparation for elections.[80]

Unfortunately, the cease-fire was broken by a third group called the United Liberation Movement for Democracy in Liberia ("UNLIMO") which was composed mainly of former ALF members.[81] The attack resulted in renewed war as Taylor attacked ECOMOG positions around Monrovia on a consistent basis as part of "Operation Octopus."[82] ECOMOG was forced to ally itself with the AFL and ULIMO against Taylor's NPFL, which cast serious doubts on the intentions of ECOMOG as the AFL and ULIMO both held terrible records regarding humanitarian intervention.[83] The final significant use of force aspect of the ECOMOG intervention was the use of Nigeria's Alpha jets to strike targets in Taylor's territory, which gave rise to allegations of ECOMOG's intention to attack hospitals and a reaffirmance of the principle of "medical neutrality" by the U.N. General Assembly.[84]

Multiple peace agreements were reached between the warring factions as conflict continued for another decade after the failure of the initial cease-fire. On July 25, 1993, the three rebel factions signed the Cotonou Peace Accord establishing joint enforcement of the peace by ECOMOG and a U.N. Observer Mission ("UNOMIL") as well as a Council of State comprised of members of the factions to control the Liberian executive powers.[85] The inclusion of UNOMIL

75. Founding ECOMOG Decision, *supra* note 27, at 67; *See also* AFRICA WATCH, *supra* note 70, at 7 (reporting that troops from Mali and Senegal joined the force after the initial intervention).

76. *See* AFRICA WATCH, *supra* note 70, at 7-9.

77. ALAO, *supra* note 72, at 53-54.

78. AFRICA WATCH, *supra* note 70, at 8.

79. *Id.* at 9.

80. *Id.* at 10.

81. *Id.* at 11.

82. *Id.*

83. *Id.* at 13.

84. *Id.* at 15-16.

85. Kofi Oteng Kufor, *Recent Development: Developments in the Resolution of the Liberian Conflict*, 10 AM. U.J. INT'L L. & POL'Y 373, 385 (1994).

was a significant departure from the Yamoussoukro IV Accord, which gave ECOMOG sole responsibility for regional enforcement.[86] Subsequently, in fall 1994 the factions agreed on yet another peace accord called the Akosombo Agreement, which primarily prohibited the formation of new rebel factions and restated ECOMOG's responsibilities in conformity with Security Council Resolutions 788 and 813.[87] Elections were subsequently held in 1997 in which Charles Taylor took 75% of the vote, ECOMOG finally withdrew from Liberia in October 1999, and the end of the conflict finally occurred in 2003 when Charles Taylor handed over the presidency to his vice president, Moses Blah.

2. Justification and Response

The intervention in Liberia clearly rose to the level of an enforcement action, and ECOWAS lacked any sort of U.N. authorization when it intervened in Liberia, making its intervention technically illegal under Charter Articles 53(1) and 2(4). However, the President of the Security Council "commend[ed] the efforts made by the [ECOWAS] head of State and Government to promote peace and normalcy in Liberia" in January 1991,[88] and the Security Council again praised ECOWAS for addressing this "threat to international peace and security" after the cease fire was broken in 1992.[89] Furthermore, the Security Council requested all other states to "respect the measures established by ECOWAS."[90] Consequently, it is possible to view the U.N.'s lack of condemnation for ECOWAS's actions as subsequent ratification or possibly even as implied consent which satisfies the Article 53(1) requirement. A more narrow interpretation of the U.N. praise is that while the actions were technically illegal, the negative response was mitigated by the positive intentions and outcome.[91]

ECOWAS justified its intervention through Article 18 of the Protocol Relating to Mutual Assistance on Defence, which allowed intervention into internal affairs which are substantially supported externally.[92] Possible conflicts with U.N. Charter Article 2(7) and OAU charter Article 3(2) seriously undermine the validity of this argument,[93] but the OAU gave ECOWAS its unwavering

86. *Id.*

87. *Id.* at 391.

88. *Statement by the President of the Security Council*, U.N. SCOR, 46th Sess., 2974th mtg. at 2, U.N. Doc. S/22133 (1991).

89. *See* S.C. Res. 788, pmbl., U.N. SCOR, U.N. Doc. S/RES/788 (Nov. 19, 1992).

90. *Id.* ¶ 10..

91. *See* FRANCK, *supra* note 3, at 139 (describing the "law of mitigation" as well as the alternative of reinterpretation).

92. ALAO, *supra* note 72, at 59; *see also* Mutual Defense Protocol, *supra* note 21, at art. 4. The NPFL was supported by both Burkina Faso and the Ivory Coast.

93. *Compare* U.N. Charter art. 2(7) (prohibiting force when conflicts are "essentially within" a state), *and* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146 (June 27) (holding that armed assistance of rebels, while constituting interference with another state's affairs, does not constitute an "armed attack" for which force is appropriate), *and* Charter of the Organization of African Unity art. 3(2), May 25, 1963, 479 U.N.T.S. 39 (requiring non-interference with internal affairs), *with* Mutual Defense Protocol, *supra* note 21, at art. 18(2).

support during the initial stages of intervention[94] and the Security Council did not bother to even discuss the conflict in Liberia until the statement by the Security Council President endorsing the efforts of ECOWAS.[95] However, a more significant criticism of the ECOMOG intervention was that it interfered with the Liberian peoples' right to self-determination when it forcibly prevented the successful takeover by Taylor's NPFL.[96] Unfortunately, no satisfactory response was given to this criticism, the previous assertions of authority under Article 18 of the Mutual Defence Protocol notwithstanding.

The most notable aspect of ECOMOG's use of force was the fact that despite the mass atrocities being perpetrated by both the AFL and the NPFL, human rights concerns were never cited as the primary justification for intervention,[97] although the Nigerian delegate to the U.N. emphasized the purpose of intervention as "to stop the senseless killing of innocent civilian nationals and foreigners."[98] Instead, the primary concern was peace in the region.[99] This choice of justification sets up the ironic situation where the intention was more in line with the original purposes of the U.N. Charter than humanitarian concerns, but the intention also made the action increasingly illegal because maintenance of peace and security falls squarely with the Security Council, the intervention for peace is clearly controlled by the provisions of the Charter, and authorization by the Security Council was required. Comparatively, humanitarian intervention is possibly not always governed by the Charter because the considerations for justice outweigh the prohibitions on force, which persuades legal scholars to apply the loopholes discussed in Part II(C)(ii) of this analysis because it is the "right" thing to do.

The U.N. response to the Liberian crisis and the subsequent intervention was limited for a number of reasons. The most probable reason for U.N. inaction was the common perception of the Liberian crisis as an internal civil war conflict,[100] which is supported by the U.S. response to Doe's request for aid.[101] Preoccupation with the situation occurring in the Middle East (the Coalition was defending Kuwait in the first Gulf War) is another plausible reason. Despite these reasons for inaction, the Security Council became active in November 1992, albeit almost three years after the inception of the conflict, by passing Resolution 788.[102] The resolution imposed an embargo of all military equipment to Liberia except for ECOWAS and condemned all attacks on the ECOWAS peace force. The Security

94. *See* REGIONAL PEACE-KEEPING RESEARCH, *supra* note 26, at xxii.

95. AREND, *supra* note 28, at 65.

96. *See ECOMOG: Peacekeeper or Participant?*, BBC NEWS, Feb. 11, 1998, *at* http://news.bbc.co.uk/2/hi/africa/55719.stm.

97. *See* AFRICA WATCH, *supra* note 70, at 26 (only one ECOWAS communiqué "even mentioned human rights concerns").

98. Letter from the Permanent Representative of Nigeria to the United Nations addressed to the Secretary-General, U.N. SCOR Doc. S/21485 (1990), *reprinted in* REGIONAL PEACE-KEEPING RESEARCH, *supra* note 26, at 75-76.

99. AFRICA WATCH, *supra* note 70, at 26.

100. AREND, *supra* note 28, at 65.

101. *See supra* notes 73-74 and accompanying text.

102. S.C. Res. 788, *supra* note 89.

Council acted again in March 1993 in passing Resolution 813.[103] Some interesting additions to Resolution 813 included U.N. contribution to the Liberian situation through observers and the first incorporation of humanitarian language.[104] Ultimately, however, the crucial aspects of the U.N. response to the ECOWAS intervention lie in the initial praise given to ECOWAS despite the apparent illegal nature of the action.

B. Sierra Leone (1997)

The intervention in Sierra Leone had a distinctly different flavor from the intervention in Liberia. The token role of ECOWAS as compared to Nigeria significantly diminished the "regional" aspect of the enforcement, although ultimately the intervention was well received by the international community.

1. Action Taken

Sierra Leone struggled with a history of authoritative regimes and civil disputes prior to and throughout the 1990's until the democratically-elected government of Ahmed Tejan Kabbah was able to secure a temporary peace through the Abidjan Accord.[105] The Accord provided for the end of a five year civil war instigated by the Revolutionary United Front ("RUF"), as well as the transformation of the RUF from a military operation to a political party in opposition to the Sierra Leone People's Party ("SLPP") and the deployment of international observers and peacekeepers within Sierra Leone.[106] U.N. Secretary General Kofi Annan responded to an indication by Kabbah's government that Sierra Leone lacked sufficient forces to ensure peace by proposing a $47 million peacekeeping operation spanning eight months.[107]

Problems arose when the Security Council failed to adopt the Secretary General's report due to concerns of U.S. approval.[108] The Abidjan Accord fell apart because the RUF rebels refused to disarm and Sierra Leone's national army lacked the capacity to enforce compliance with the Accord.[109] Consequently, on May 25, 1997, rebel soldiers took over government buildings and prisons in the capital of Freetown and released Major Johnny Paul Koromah, the leader of the RUF who was imprisoned for prior attempted coup.[110] Koromah declared himself

103. S.C. Res. 813, U.N. Doc. S/RES/813 (Mar. 26, 1993).

104. *Id.* ¶ 14-15, 18.

105. Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 325-26 (1998); *see also* Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Nov. 30, 1996, R.U.F.-Sierra Leone, http://www.sierra-leone.org/abidjanaccord.html [hereinafter Abidjan Accord].

106. Abidjan Accord, *supra* note 105, at arts. 1, 12-13.

107. *See* The Secretary-General, Report of the Secretary-General on Sierra Leone, delivered to the Security Counsel, U.N. Doc. S/1997/80 (Jan. 26, 1997).

108. Nowrot & Schabacker, *supra* note 105, at 326 (noting that the Clinton Administration was engaged in sensitive budget negotiations with Congress at the time, which acted as a substantial deterrent for any notion of engaging in any African peacekeeping process).

109. *See id.* at 326-27 (noting the inability of the national army was exacerbated by soldiers defecting to the RUF due to lack of wages and racism).

110. *Id.* at 327.

as the head of government and suspended the constitution.[111] President Kabbah had only been in power for fourteen months before being forced into exile in neighboring Guinea.[112]

The Nigerian government responded immediately under the auspices of ECOWAS. Nigeria already had peacekeeping troops positioned within Sierra Leone during the civil war period, and Nigeria responded to the military coup d'etat with the consent of President Kabbah. Nigeria engaged in all out combat against RUF, using additional troops and shelling rebel targets in Freetown with warships.[113] The RUF withstood these initial uses of force, and West African nations resorted to mediation to restore the democratic government.

An apparent breakthrough occurred in October 1997 when both President Kabbah and Major Koromah signed the Conakry peace agreement.[114] The agreement called for the immediate disarmament of the RUF and restoration of Kabbah as head of state within six months. Unfortunately, during this period the human rights situation deteriorated substantially. The Kamajors, a rural militia fighting against the RUF, initiated several attacks which caused a vicious response by the RUF including some of the worst state-sponsored atrocities ever in Sierra Leone.[115] With two months remaining on the Conakry agreement timeline, Nigeria ousted Major Koromah's military junta. The release of Freetown resulted from a nine-day offensive under the auspices of ECOMOG, which was well received by both the Sierra Leone population and the international community.[116]

2. Justification and Response

The main justifications put forth by ECOWAS and the Nigerian government for the use of force were: the right to self-defense, the appeal by President Kabbah seeking ECOWAS assistance, the atrocities committed by junta troops against Sierra Leonean citizens, the threat to international peace and security in the region caused by the flow of Sierra Leonean refugees to neighboring countries, and the prevention of the execution of "atrocities" by the junta.[117] These reasons are a substantial departure from the justifications used in the Liberian intervention in that incorporation of the humanitarian aspects of the conflict is primary, while the need for peace and restoration of order is not. Furthermore, the final justification hints of a preemptive defense of human rights, which has certainly not gained acceptance in the international community. Additional criticisms of the legality of this intervention include the fact that Kabbah had already been expelled from the country, making the legitimacy of his request for outside intervention more uncertain than Doe's Liberian government, and the fact that the Security Council

111. *Id.*
112. *Id.* at 325.
113. *Id.* at 327.
114. *Id.* at 328-29.
115. *See id.* at 329 (noting most the atrocities were concentrated around the southern town of Bo).
116. *Id.* at 330.
117. *Id.* at 349-50.

had passed a resolution which did not authorize force while addressing the issue, essentially removing implied consent as a justification.[118]

The U.N. sent conflicting messages in its reaction to the intervention. The U.N. passed Resolution 1132 in October 1997, which condemned the human rights violations in Sierra Leone and declared the conflict was a threat to the peace.[119] The resolution also imposed oil and arms embargos on Sierra Leone as well as invited intervention by ECOWAS.[120] However, ECOWAS was limited to "strict implementation" of the embargo and full enforcement powers were absent from the resolution, which could imply the Security Council did not want force used to restore democracy.[121] Ironically, Nigerian forces acting under ECOWAS had already used substantial force in the absence of Security Council authorization, and those forces initiated armed conflict again after the resolution.[122] The conflicted aspect of the U.N. reaction came in the form of a statement issued after the restoration of Kabbah's government that welcomed "the fact that the military junta has been brought to an end" and commended "the important role" that the ECOWAS played in the "peaceful resolution" of the crisis.[123] Similar to Liberia, the U.N. *post facto* ratified the seemingly illegal use of force by ECOWAS despite the subtle mandate against force in Resolution 1132.

However, the answer to the enigma may lie with the fact that the political basis for intervention was quite sound. The displacement of a peaceful, legitimate, and democratic government through a military coup that utilizes mass human rights violations as a combat technique[124] is the epitome of why the U.N. prohibits the use of force and such a coup certainly holds no logical connection to self-determination.

Additionally, the ECOWAS justification of self-defense appears to legitimate for two reasons. First, the intervention by ECOMOG was in reaction to an attack by RUF forces on an ECOMOG military camp at Lungi, and simply because the troops were stationed within Sierra Leone does not deprive ECOMOG of the right to defend its soldiers.[125] Second, the combination of the Security Council declaration of a threat to the peace in Resolution 1132 and the mass flow of refugees across state borders could satisfy the "armed attack" requirement of Article 51 for the individual neighboring states, which in turn would authorize collective self-defense by ECOWAS.[126] The significant criticism of this

118. David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 BYU J. PUB. L. 1, 28-30 (2003).

119. S.C. Res. 1132, at pmbl., U.N. Doc. S/Res/1132 (Oct. 8, 1997).

120. *Id.* ¶¶ 6, 8.

121. *See id* ¶ 8.

122. *See supra*, notes 113-116 and accompanying text.

123. *See Statement by the President of the Security Council*, U.N. SCOR, 53nd Sess., 3857th mtg. at 1, U.N. Doc. S/PRST/1998/5 (Feb. 26, 1998).

124. *See* Nowrot & Schabacker, *supra* note 109, at 325, 332 (noting that RUF continued to amputate limbs in order to bring about subservience through terror).

125. *See id.* at 366.

126. *See* S.C. Res. 1132, *supra* note 119, at pmbl.; *see also* Nowrot & Schabacker, *supra* note 109, at 349-50.

justification is the lack of proportionality. Any attack on ECOMOG troops most certainly was outmatched by the use of warships and a complete invasion Sierra Leone, although the attack was brief and may have been necessary to cease the continuing threat of attacks from the RUF.

C. Application of Humanitarian Intervention Factors

The most significant analysis of the ECOWAS interventions is the applicability of the factors described by Professor Ved P. Nanda.[127] Although most criteria are quite relevant and applicable, the purpose criterion is not as important in the regional enforcement setting, and the collective / unilateral distinction is moot.

1. Necessity

Neither Liberia nor Sierra Leone involved systematic violations *before* force was considered and used, and the main source of necessity arose out of political unrest rather than genocide. However, severe violations did occur in both cases which probably warranted intervention on a humanitarian basis alone, regardless of the other factors. Thus, in my opinion, the necessity criterion was fulfilled.

2. Proportionality

As discussed above, there were certainly some issues in proportionality regarding the Sierra Leone intervention. But the main question here is what is being compared? If the initial actions are viewed as displacing a legitimate government, then the proportional response is restoration of that government. However, if the standard is simply a cessation of human rights violations, then offensive attacks against the perpetrators aren't warranted. The deciding factor for my own analysis is the notion that violations of human rights perpetrated by *aggressors* can typically only be stopped by offensive action in order to neutralize the threat. Consequently, purely defensive measures would, in a practical sense, never be effective and true proportionality could never be achieved. Thus the most legally viable option is assessing the force allowed as compared to the force imposed, which yields the result that proportionality was satisfied in both ECOWAS interventions because force was only used to restore the incumbent government.

3. Purpose

Despite the significance of intention in much of the law,[128] the purpose requirement is not necessary with regard to collective intervention. The reason for this is that the requirement of a purely humanitarian interest is used primarily as a safe-guard against abuse of the humanitarian intervention doctrine as a cover for other nefarious motives. However, in regional enforcement actions, the collective will of the organization acts to mitigate extreme views and allows an objective assessment of the conflict and the proper course of action. Consequently, the

127. *See infra* p.12 and note 56.

128. For example, the doctrine of *mens rea* in the criminal law. Graeme Wood, *Getting to the Very Roots of Genocide*, N.Y. SUN, Oct. 3, 2007 (reviewing Ben Kiernan, Blood and Soil (2007)), *available at* http://www.nysun.com/article/63837.

purpose of the organization becomes somewhat irrelevant, which was subtly demonstrated by the fact that ECOWAS intervened both times specifically to restore peace and political stability, but the U.N. approved of the actions anyways. ECOWAS's collective interpretation of the rationale for intervention will be acceptable to the international community, absent extreme circumstances, because regional enforcement transfers the subjective standard of unilateral action into an objective standard of collective action.

4. Collective

Despite the prominence of Nigerian forces within ECOMOG, both interventions were sufficiently collective because of the need for group decision at the executive level of ECOWAS to employ force.

5. Maximization of Outcome

Both interventions clearly improved the situations in Liberia and Sierra Leone regarding violations of human rights. However, one significant factor affecting the outcome in Liberia is the doctrine of self-determination and the ability of the people of Liberia to take control of their country away from an oppressive government. Although Taylor's NPFL was not much of a beneficial alternative, the sheer extent of his control over the territory in Liberia and the significant portion of population that voted for him in the 1997 elections certainly support the argument that the NPFL deserved to take legitimate control of Liberia through civil unrest, which is not a violation of international law, but was precluded by unlawful intervention in internal state matters.

In conclusion, each of the factors for humanitarian intervention was met in the ECOWAS actions, and consequently those actions or other similar actions should not be considered illegal, although technically they are under Article 2(4).

IV. RECOMMENDATIONS

Upon reflection of all the issues involved, there are three recommendations that should be considered for future instances of regional intervention. First, regional organizations should emphasize the trans-boundary effects of the conflicts, such as border skirmishes or mass flows of refugees into foreign states. The reason for this is these types of incidences give rise to the broad justification of Article 51 self-defense as well as the traditional justifications for humanitarian intervention. Although not technically an "armed attack," most trans-boundary instances will be determined to be threats to the peace, which is usually sufficient to satisfy the armed attack criteria. Moreover, identifying particular acts directed or focused towards a member state of a regional organization provides more legitimacy to the action as one of collective self-defense.

Second, regional organizations should increase the number of countries involved militarily. Not only does it spread the cost and burden of intervention, but also the mere fact that a multitude of countries has consented to the action increases the legitimacy of the intervention as objectively reasonable. For example, although the political and humanitarian justifications were slightly stronger in the Sierra Leone intervention, the primary bordering on solitary role of

the Nigerian government casts doubt on the action as unilateral rather than collective force.

Third, a majority of the problems with legal justification for humanitarian intervention would be alleviated by the formation of an objective U.N. committee which could assess situations for human rights violations and recommend action by the Security Council if possible or regional organizations if not. Thus, the fundamental prohibition of illegal force could be maintained by the U.N. while still accounting for the need for protection of human rights.